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No. 15247

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**United States**  
**Court of Appeals**  
for the Ninth Circuit

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LOUIS L. GOWANS AND HELEN T. GOWANS,  
Husband and Wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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**Transcript of Record**

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**Petition to Review a Decision of the Tax Court  
of the United States**

FILED

DEC 26 1950



No. 15247

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United States  
Court of Appeals  
for the Ninth Circuit

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LOUIS L. GOWANS AND HELEN T. GOWANS,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

FRANK D. PADGETT,  
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For the Petitioner.

CHARLES K. RICE,  
Asst. U. S. Attorney General,  
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Attorney, Dept. of Justice,  
Washington 25, D. C.  
For the Respondent.



The Tax Court of the United States

Docket No. 50427

LOUIS L. GOWANS and HELEN T. GOWANS,  
Husband and Wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DOCKET ENTRIES

1953

Sept. 4—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 8—Copy of petition served on General Counsel.

Sept. 4—Request for Circuit hearing in Honolulu, T.H., filed by taxpayer. 9/15/53—Granted.

Oct. 26—Answered filed by General Counsel.

Nov. 5—Copy of answer served on taxpayer—Honolulu, T.H.

1954

May 7—Hearing set July 9, 1954, Honolulu, T.H.

May 27—Hearing changed to July 15, 1954, Honolulu, T.H.

July 22—Hearing had before Judge LeMire on the merits; Appearance of Frank D. Padgett and Stipulation of Facts filed; Brief due Sept. 22, 1954; Respondent's Brief due Nov. 22, 1954 and Petitioner's reply due Dec. 22, 1954.

Aug. 30—Transcript of Hearing 7/22/54 filed.

1954

Sept. 17—Brief filed by taxpayer. Copy served.

Nov. 22—Motion for extension to Feb. 20, 1955 to file answer brief filed by General Counsel.  
11/23/54—Granted.

1955

Feb. 21—Motion for extension to Mar. 7, 1955 to file answer brief filed by General Counsel.  
2/23/55—Granted.

Mar. 3—Answer Brief filed by General Counsel.

Mar. 30—Motion for extension to April 26, 1955 to file reply brief, filed by taxpayer. 3/30/55  
—Granted.

Apr. 11—Reply Brief filed by taxpayer. Copy served.

1956

May 31—Memorandum findings of fact and opinion filed. Judge LeMire. Decision will be entered under Rule 50. Served 6/1/56.

July 3—Agreed computation filed.

July 5—Decision entered, Judge LeMire, Div. 5. Served 7/6/56.

July 20—Petition for Review by U. S. Court of Appeals for the 9th Circuit, filed by petitioner; with attached, Designation of Record, Statement of Points on Appeal, Statement of Service, and Notice, filed by petitioner.

The Tax Court of the United States

Docket No. 50427

LOUIS L. GOWANS and HELEN T. GOWANS  
(Husband and Wife),

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols ADC-Ap:LA, SF:LVH: DRU-150-D) dated June 5, 1953, and as a basis of their proceeding allege as follows:

I.

The petitioners are individuals, husband and wife, and reside at 2785 Round Top Drive, Honolulu, Hawaii. Their joint income tax returns for the calendar and taxable years 1948, 1949, and 1950, were filed with the Collector of Internal Revenue, District of Hawaii, at Honolulu, Hawaii.

II.

The notice of deficiencies, a copy of which is attached and marked Exhibit A, was mailed to the petitioners on June 5, 1953.

income for each of the calendar years 1948, 1949, and 1950, statutory depletion of a natural deposit.

F. The Commissioner of Internal Revenue erred in determining that there are deficiencies of \$2,784.52, \$2,016.86, and \$4,759.92, in the petitioners' returns of income taxes for the calendar years 1948, 1949, and 1950, respectively, and in failing to determine, instead, that the petitioners overpaid their liabilities for income taxes for the three years aforesaid, in the amounts of \$1,656.92, \$1,657.22, and \$2,827.70 respectively.

#### V.

The facts upon which the petitioners rely as the basis of this proceeding are as follows:

A. The petitioners are husband and wife, citizens of the United States, and residents of the City and County of Honolulu, Territory of Hawaii.

B. Petitioners always have computed their net incomes upon the bases of cash receipts and disbursements and calendar year.

C. Throughout the period begun January 1, 1945, and ended December 31, 1950, as well as prior and subsequent to said period, each of the petitioners has been employed full time by the Honolulu Gas Company, Limited, a public utility, in Honolulu, Hawaii.

D. The petitioners, throughout their lives as husband and wife, have combined their services, earnings, and capital. Their investments have been joint. Furthermore, during the period begun June 1, 1945,

and ended June 30, 1949, there was in effect in the Territory of Hawaii a Community Property Law. The said law provided that all property, both real and personal, including the earnings of the husband and the earnings of the wife and including rents, issues, income and other profits of the separate property of the husband and the wife, acquired by the husband or by the wife after marriage or on or after the effective date of the said Act, whichever was the later, should be community property of the husband and wife, and each was vested with an undivided one-half interest therein. The respective interests of the husband and the wife in such community property constituted present, existing, and equal interests and arose as an incident of marriage.

E. Under date of December 28, 1932, the petitioners, as joint tenants, purchased from A. V. Gear, under an agreement of sale, a parcel of land, in consideration of \$7,500.00, Lot 824, Makiki Round Top Lots, City and County of Honolulu, containing an area of three (3) acres, more or less, for use as their homesite. A. V. Gear had acquired the said lot under the Homestead Laws of the Territory of Hawaii, Land Patent Grant Number 6815, under date of February 20, 1917. Gear died testate before the purchase price had been paid in full, and devised Lot 824, subject to the Agreement of Sale, to his wife. The widow, Addie B. Gear, died testate under similar circumstances and devised Lot 824, subject to the Agreement of Sale, to her children. The Gears' children, Harold B. Gear and Hazel Gear

Raseman, after receipt of payment in full of account of the sale price of said homesite, deeded to the petitioners, on July 5, 1936, Lot 824, aforesaid.

F. Petitioners sold 10,018 square feet of Lot 824, aforesaid, facing Round Top Drive, by unrecorded agreement of sale dated April 30, 1946. Upon payment, during 1947, of the final installment of the consideration of \$10,000.00, petitioners executed on October 8, 1947, and delivered to the purchasers, a deed.

G. During September, 1937, the petitioners began the construction upon Lot 824, Makiki Round Top Lots, at 2785 Round Top Drive, of their home, which they have occupied continuously since its erection. An extension thereto was begun in November, 1944.

H. On February 24, 1938, the petitioners purchased at public auction, under Special Sale Agreement No. 1762, in consideration of \$8,150.00, in accordance with the provisions of section 73 of the Hawaiian Organic Act and Chapter 54, Revised Laws of Hawaii, 1935, Lot No. 822, Makiki Round Top Lots, City and County of Honolulu, containing two and ninety-seven hundredths (2.97) acres of land. Lot 822 adjoins Lot No. 824, both aforesaid.

I. Honolulu Construction & Draying Company, Limited, a Hawaiian corporation engaged in business as a general construction contractor and manufacturer of tile, in the City and County of Honolulu, hereinafter referred to as "HC&D," had need for



black sand for the manufacture of tile products and for other purposes incident to the prosecution of World War II. HC&D determined that the portion of Lot No. 824 which was unessential to the petitioners' homesite and the corresponding portion of Lot No. 822, aforesaid, were sources of black sand which it needed in its business. HC&D offered to purchase in fee, in the Fall of 1944 and in consideration of \$92,000.00, the approximately 4.433 acres of homestead land aforesaid and petitioners accepted said offer. HC&D instructed its attorney to prepare a deed to cover the purchase, but said attorney determined that petitioners had not perfected their title to Lot No. 822 by erecting a residence upon the premises, as required by law. Furthermore, the attorney for HC&D found that the Hawaiian Organic Act and the statutes of the Territory of Hawaii, governing the sale, lease, or other use or disposition of public lands, permitted the said lots to be used for residence purposes only and prohibited any part thereof, or interest therein or control thereof, without the written consent of the commissioner of public lands and the governor of the Territory of Hawaii, being contracted in any way, directly or indirectly, by process of law or otherwise, conveyed, mortgaged, leased, or otherwise transferred to, or acquired or held by or for the benefit of, any alien or corporation. Petitioners, during November, 1944, addressed the Commissioner of Public Lands in office and, after pointing out that war restrictions on private building had prevented

them from constructing upon Lot No. 822 the dwelling required by Special Sale Agreement No. 1763; that the steep, sloping nature of Lot No. 822 required extraordinary grading to prepare it for homesite purposes; that HC&D needed black sand to manufacture tile for the new Tripler General Hospital, a defense project; that the lower portion of Lot 822 was a source of the black sand desired by HC&D; and that HC&D, because of the nature of its business, and not the petitioners, could make the otherwise inaccessible portion of Lot No. 822 immediately useful to the community and helpful to the war effort, requested an extension of time to fulfill the conditions of their Special Sale Agreement of February 24, 1938, and permission to assign to HC&D the lower part of Lot No. 822. Petitioners agreed to post a bond to assure their fulfillment of the condition which required the construction of a dwelling on Lot No. 822. The said Commissioner of Public Lands, on November 30, 1944, granted the petitioners' request for an extension of time to fulfill their obligation to erect a dwelling on the site but disapproved the proposal "made to commercialize the lower portion of this lot in order that the required dwelling house may be constructed."

J. Petitioners and HC&D conceived, subsequently to November, 1944, a plan by means of which HC&D could obtain the black sand which it needed for fulfillment of its Army hospital tile contract and for other commercial purposes and the petitioners could fulfill their obligations under Special Sale Agree-

ment No. 1762, dated February 24, 1938. HC&D employed Roswell Towill, engineer and surveyor, to determine by survey the volume of black sand contained in the lower parts of adjoining Lots Nos. 822 and 824, to plat the area which would remain after removal of the overburden of black sand, in accordance with the requirements of the City Planning Commission, City and County of Honolulu, to construct an access road across the land of an abutting property owner, and to install a water pipeline which would be available to petitioners and to the abutting property owners. The said engineer and surveyor determined by metes and bounds and depth that there were approximately 250,000 cubic yards of black sand beneath a surface area of approximately 192,000 square feet of Lots Nos. 822 and 824 and estimated that the cost, in 1945, of grading the land after removal of the black sand, installing a water pipeline, and completing an access road to Round Top Drive would approximate \$32,000.00.

K. Under date of September 4, 1945, to effectuate the plan aforesaid, the petitioners and HC&D executed an Agreement, which recited that the petitioners were the owners of certain interests in Lots 822 and 824 of the Makiki Round Top Lots, City and County of Honolulu; that a portion of the said lots encompassed a surface area of approximately 192,000 square feet, called the "Sand Area," as shown by a survey of R. Towill, and estimated to contain approximately 250,000 cubic yards of black

sand, which HC&D desired to acquire for business purposes; that it was practicable to remove the approximately 250,000 cubic yards of black sand and, with proper grading, leave the premises suitable for home building sites, provided that an access road to Round Top Drive, a government highway, would be constructed over rights of way to be obtained from abutting property owners, and that petitioners were negotiating for the said rights of way; that HC&D was willing to buy petitioners' interest in the land which comprised the said "Sand Area" or to quarry, buy and haul away black sand therefrom, and that petitioners, subject to receiving the consent of the Commissioner of Public Lands, Territory of Hawaii, was willing to sell the said "Sand Area"; that HC&D agreed to obtain at its expense a plan of subdivision of the said "Sand Area" locating and showing thereon an access roadway to the nearest government highway; that HC&D agreed to purchase, with the consent of the said Commissioner of Public Lands, the interest of the petitioners in and to the said "Sand Area" and to pay therefor fifty cents (50c) per square foot of land within the said "Sand Area"; that, if the said Commission would not consent to the sale of the petitioners' interest in the said "Sand Area" but would permit HC&D to quarry and withdraw black sand from said "Sand Area," HC&D agreed to quarry and haul away from the said "Sand Area" approximately 250,000 cubic yards of black sand and to pay therefore at the rate of forty cents (40c) per cubic yard, within five years from the date of the Agree-

ment; that HC&D, after withdrawal of the approximately 250,000 cubic yards of black sand from the said "Sand Area" agreed to complete, within the time limit set, the grading of the sand area subdivision and to leave the area in condition for sale and use as building sites with road and water mains in the manner required by the City Planning Commission and the Board of Water Supply, City and County of Honolulu, and to pave the access road to the nearest government highway across the lands of abutting property owners; that the petitioners agreed to sell their interest in the land comprising the "Sand Area" or in approximately 250,000 cubic yards of black sand, upon the terms and conditions aforesaid, provided that the consent of the said Commissioner of Public Lands was first obtained and that rights of way for an access road were obtained from abutting property owners; that petitioners and HC&D mutually agreed that, with the consent of the Commissioner of Public Lands, their preferences were to sell and buy, respectively, the petitioners' interest in the said "Sand Area" rather than to sell and buy, respectively, black sand; that in the event the petitioners sold their interest in the said "Sand Area" to HC&D, real property taxes would be prorated; and that the agreement should become and remain in force only upon obtaining the appropriate approval and consent of the said Commissioner of Public Lands.

L. Petitioners and HC&D believed and agreed that petitioners should perfect their title to Lot No.

S22 before performance of the terms of the Agreement of September 4, 1945. The termination of hostilities of World War II had made available for the erection of private dwellings, construction materials in the possession of HC&D, which, to speed the petitioners' acquisition of title to Lot No. 822 and performance under the Special Sale Agreement of September 4, 1945, agreed to advance the materials and labor for the construction of a dwelling on Lot No. S22. Construction of the dwelling on Lot No. 822 was begun during January, 1946, and was completed several months later, at a cost to the petitioners of \$19,322.81. To secure HC&D against loss, the petitioners agreed to execute and deliver to HC&D a non-interest bearing mortgage of the premises.

M. Under date of May 23, 1946, the Governor of the Territory of Hawaii duly executed Land Patent No. 11,315, which granted and confirmed unto the petitioners, as joint tenants with full right of survivorship, title to Lot No. 822, Makiki Round Top Drive, City and County of Honolulu, in consideration of \$8,150.00 and compliance with the terms and conditions of Special Sale Agreement No. 1762, issued on February 24, 1938, covering 2.97 acres of land.

N. Because of the delay experienced by the petitioners in perfecting their title to Lot No. 822, aforesaid, HC&D was delayed, until on or about July 1, 1946, in commencing its performance of the

terms of the Agreement of September 4, 1945, aforesaid. Petitioners' banker, Bishop National Bank of Hawaii at Honolulu, inquired of HC&D the status of the said Agreement, and HC&D, under date of August 1, 1947, informed the said banker that the aforesaid Agreement obligated it to remove from Lots 822 and 824 approximately 250,000 cu. yds. of black cinder, to pay therefor at the rate of 40c per cubic yard for all cinder removed, to subdivide and terrace the remainder of the approximately 4.433 acres into eighteen house lots of approximately 11,000 sq. ft. each, to install water mains, and to construct a paved access road to the area. The petitioners, on August 21, 1947, gave their joint and several note and mortgage for \$70,000.00 to Bishop National Bank of Hawaii at Honolulu, and, as additional security therefor, petitioners assigned to Bishop National Bank of Hawaii at Honolulu, under date of September 9, 1947, all of their right, title and interest in and to all moneys, rights, claims, privileges, covenants and agreements made for their benefit and provided for or contained in the Agreement of September 4, 1945, aforesaid.

O. HC&D, when asked to accept the assignment aforesaid, addressed the petitioners, on September 16, 1947, and pointed out that it was incumbent upon HC&D to complete the removal of approximately 250,000 cu. yds. of cinder (black sand) and the installation of the prescribed improvements on Lots No. 822 and 824, aforesaid, within five years from September 1, 1945, that HC&D had been unable to

commence removal of cinder from the said area until petitioners had perfected their title to Lot No. 822, which had occurred on or about July 1, 1946, that HC&D had entered into a parallel, five-year agreement, effective July 1, 1946, with adjoining property owners over whose lands the access road to the aforesaid black sand area was to be constructed, and requested petitioners to grant an extension of time to July 1, 1951 (five years from July 1, 1946), within which to remove the approximately 250,000 cu. yds. of black sand and to complete the improvements required by the agreement of September 4, 1945, aforesaid. Petitioners, under date of October 8, 1947, assured HC&D that, upon the payment in full of the petitioners' joint and several note for \$70,000.00, aforesaid, by the application thereto of the proceeds from the sale of the black sand, they would extend to July 1, 1951, the period for the removal of the black sand and the completion of the improvements required by the aforesaid agreement.

P. Early during 1950, HC&D realized that, for certain reasons, it would be unable to remove, on or before July 1, 1951, the balance of the approximately 250,000 cu. yds. of black sand from the 4.433-acre portion of Lots No. 822 and 824, aforesaid, and to complete the grading thereof, all as required by the agreement of September 4, 1945, as amended, and requested an extension of time to July 1, 1952, within which to complete its performance of the terms of the said agreement. Under date of May 19,



1950, HC&D and petitioners executed an agreement extending to July 1, 1952, the period for completion of its "right and obligation" to remove the balance—estimated then to be approximately 133,000 cu. yds.—of the approximately 250,000 cu. yds. of black sand from Lots 822 and 824, aforesaid, and to complete the improvement of the said lots in the manner specified. As consideration for extending the said period to July 1, 1952, HC&D agreed to endorse a joint and several promissory note of the petitioners for \$48,960.00, payable to the Bishop National Bank of Hawaii at Honolulu, in liquidation of the balance due on their note for \$70,000.00, payable to the said Bank and dated August 21, 1947; to pay the balance due on the purchase price of the approximately 250,000 cu. yds. of black sand at the rate of \$2,040.00 monthly; to pay the interest which accrued after May 19, 1950, on the said \$48,960.00 note; to pay the real property taxes attributable to the 4.433-acre area; and to perform the petitioners' obligations to the adjacent property owners who had granted to petitioners rights-of-way for an access road across their lands. The assignment of September 9, 1947, aforesaid, was cancelled, and the petitioners assigned to the Bank aforesaid, until the said note was paid in full, the payments due on the black sand contract.

Q. Pursuant to the agreement of May 19, 1950, aforesaid, HC&D paid to Bishop National Bank of Hawaii at Honolulu, during the calendar year 1950, \$753.78 interest on petitioners' note for \$48.960.00, dated May 19, 1950. The Commissioner of Internal

Revenue included in his determination of the proceeds which petitioners received during 1950, viz., \$19,126.57, on account of the sales price of the black sand en bloc, aforesaid, \$741.13 of the \$753.78 interest which HC&D paid during 1950 for the petitioners' account. The \$741.13 was an understatement, made by the Commissioner, of the amount of said interest.

R. HC&D completed its performance of the terms of the agreement of September 4, 1945, as amended, during 1952. Formal acceptance by the petitioners, of the removal of 250,010 cubic yards of black sand from the "Sand Area," of the grading of the 4.433-acre area included in Lots No. 822 and 824, of the installation of water mains, and of the construction of an access road by HC&D, occurred on September 15, 1952. The formal acceptance by the City and County of Honolulu, of the access road, occurred on October 2, 1952, and the formal acceptance by the Board of Water Supply, City and County of Honolulu, of the water mains installation occurred on November 5, 1952.

S. The actual cost to HC&D of the improvement of the 4.433-acre area of Lots 822 and 824, aforesaid, in the manner that was required by the agreement of September 4, 1945, as amended, was \$69,254.23. When the improvements required by the Agreement of September 4, 1945, were contemplated, during 1945, it was estimated that their cost would approximate \$32,000.00.

T. The fair market value on September 4, 1945, of the contract which was executed by the petitioners and HC&D on the said date, as aforesaid, was not less than \$113,135.65.

U. During the calendar year 1945, the petitioners did not receive from HC&D, neither directly nor indirectly, any payment in cash or its equivalent other than the contract of September 4, 1945, on account of the consideration due to the petitioners under the terms of the said Agreement of September 4, 1945, by and between the petitioners and HC&D. The first payment on account of the sales price of the black sand en bloc was made by HC&D and was received by the petitioners during the calendar year 1947.

V. HC&D withdrew black sand from the "Sand Area" which it had purchased en bloc from the petitioners on September 4, 1945, and paid therefore in cash to the petitioners or, at their direction, to their banker, in the manner provided in the Agreement of September 4, 1945, as amended, by years as follows:

Years	Cubic Yards	Cash Payments
1947.....	35,897.47	\$ 14,358.98*
1948.....	30,694.50	15,463.83*
1949.....	40,356.25	12,600.00
1950.....	44,692.25	19,126.57
1951.....	16,414.50	24,480.00
1952.....	81,955.03	13,974.62
	<hr/>	<hr/>
Totals.....	250,010.00	\$100,004.00
	<hr/>	<hr/>

\*As received by petitioners: \$13,247.18 (1947); \$16,575.63 (1948)

W. HC&D reimbursed petitioners for real property taxes paid by petitioners on the "Sand Area" which HC&D had purchased en bloc, as follows:

Years	Amounts
1950.....	\$276.35
1951.....	525.96
1952.....	283.45

X. By virtue of the Agreement dated September 4, 1945, by and between petitioners and HC&D, the petitioners divested themselves, and HC&D acquired, all of the petitioners' right, title, and interest in and to the said "Sand Area," which comprised approximately 192,000 square feet of surface area and approximately 250,000 cubic yards of black sand.

Y. The petitioners, excepting the black sand sold en bloc pursuant to the Agreement of September 4, 1945, as amended, have never sold any black sand or cinders as such, neither by the load nor in any other quantity, to any person, natural or artificial. The petitioners had never advertised nor held for sale any commodity, nor had they maintained, at any time, an office or employed brokers to sell real estate, black sand, or any other commodity.

Z. In their joint income tax return for the calendar year 1948, the petitioners included in their gross income, on account of the sales price of black sand sold en bloc to HC&D pursuant to the Agreement of September 4, 1945, a long-term capital gain of \$7,326.80, which purported to be 50 per centum of \$15,463.83, which HC&D determined was due to the petitioner on account of the sale of the black sand

en bloc and which was payable upon the basis of black sand removed monthly during 1948.

AA. The Commissioner of Internal Revenue determined that the moneys which HC&D paid to petitioners during 1948 pursuant to the Agreement of September 4, 1945, were ordinary income and substituted for the \$7,326.80 which petitioners had returned as aforesaid, \$16,575.63, which comprises the \$15,463.83 that was based upon withdrawals of black sand from the "Sand Area" during 1948 and \$1,111.80 that HC&D paid to petitioners during January, 1948, upon the basis of black sand removed during December, 1947.

BB. In their joint income tax return for the calendar year 1949, the petitioners included in their gross income, on account of the sales price of black sand sold en bloc to HC&D pursuant to the Agreement of September 4, 1945, a long-term capital gain of \$6,300.00, which is 50 per centum of the \$12,600.00 that HC&D determined was due to the petitioners on account of the sales price of the black sand sold en bloc and payable upon the basis of black sand removed monthly during 1949.

CC. The Commissioner of Internal Revenue determined that the moneys which HC&D paid to petitioners during 1949 pursuant to the Agreement of September 4, 1945, were ordinary income and substituted for the \$6,300.00 which petitioners had returned as aforesaid, \$12,600.00 which the petitioners had actually received from HC&D during the calen-

dar year 1949 upon the basis of black sand removed during 1949.

DD. In their joint income tax return for the calendar year 1950, the petitioners included in their gross income on account of the sales price of black sand sold en bloc to HC&D pursuant to the Agreement of September 4, 1945, a long-term capital gain of \$8,543.29, which purported to be 50 per centum of the \$19,126.57 that HC&D determined was due to the petitioners on account of the sales price of the black sand sold en bloc and payable, until May 19, 1950, upon the basis of black sand removed monthly during 1950. Commencing June 20, 1950, the balance due on the sales price of the black sand sold en bloc to HC&D became payable at the rate of \$2,040.00 monthly. Petitioners inadvertently omitted from their determination of the long-term capital gain which they included in their gross income for 1950, one monthly payment of \$2,040.00 which they received during 1950.

EE. The Commissioner of Internal Revenue determined that the moneys which HC&D paid to petitioners during 1950 pursuant to the Agreements of September 4, 1945, as amended, and May 19, 1950, were ordinary income and substituted for the \$8,543.29 which petitioners had returned as aforesaid, \$19,867.70, which comprises \$19,126.57 that the petitioners actually received during 1950 on account of the sales price of the black sand sold en bloc to HC&D and payable upon the basis of the Agreements of September 4, 1945, and May 19, 1950, both

aforesaid, and \$741.13 of the \$753.78 interest which the petitioners actually received during 1950 pursuant to the Agreement of May 19, 1950.

FF. The petitioners and HC&D intended that the transaction the subject of the Agreement of September 4, 1945, as amended, should be a sale of black sand en bloc. The benefits and burdens of ownership of the "Sand Area" passed absolutely from the petitioners to HC&D on September 4, 1945, in accordance with the intentions of the parties and in fact.

GG. The costs of Lots 822 and 824, aforesaid, and the allocation of the said costs to the portion of the lots: 1) retained by the petitioners for homesite purposes; 2) sold during 1947, and, 3) subject to the provisions of the Agreement of September 4, 1945, follow:

Costs:

Lot No. 822.....	\$ 7,500.00
Lot No. 824.....	8,150.00
Total .....	<u>\$15,650.00</u>

Allocation:

Usage	Area Sq. Ft.	Cost Allocation
Homesites .....	56,936	\$ 3,426.17
Lot sold .....	10,018	602.84
"Sand Area" .....	193,117	11,620.99
Totals .....	<u>260,071</u>	<u>\$15,650.00</u>

HH. Petitioners duly filed with the Collector of Internal Revenue, District of Hawaii, claims for the refund of income taxes overassessed and overpaid for the calendar years 1948, 1949, and 1950, in the

amounts respectively of \$1,656.92, \$1,657.22, and \$2,827.70, on the ground that they had erred in including in their gross incomes for the calendar years aforesaid long-term capital gains which they had realized in fact during a calendar and taxable year prior to 1948, namely, during the calendar year 1945.

II. The petitioners had not claimed, and the Commissioner of Internal Revenue has not allowed, in the determination of the petitioners' taxable net incomes for the calendar years 1948, 1949, and 1950, any depletion of natural deposits, as provided in sections 23(m) and 114(b) (4), I.R.C.

Wherefore, the petitioners pray that this Court may hear the proceeding and determine a) that the Agreement of September 4, 1945, effected a completed sale, in 1945, of black sand in place; b) that the black sand in place was a capital asset, as defined in section 117(a) (1), I.R.C.; c) that the capital asset had been held by the petitioners in excess of six months; d) that the only consideration received by the petitioners during 1945 as consideration for the said sale was the contract dated September 4, 1945, aforesaid, and that the fair market on September 4, 1945, of the said contract was \$113,135.65; e) that the amounts received by the petitioners from HC&D, i.e., \$16,575.63 during 1948, \$12,600.00 during 1949, and \$19,126.57 during 1950, on account of the sales price of the black sand in place were not incomes of the petitioners received during the calendar years 1948, 1949, and 1950; f) that there are no deficiencies in the petitioners' returns of income



taxes for the calendar years 1948, 1949, and 1950 and that, instead, the petitioners are entitled to refunds of income taxes overpaid for the said taxable years as claimed aforesaid; g) that alternatively, if the Court were to determine that the aforesaid agreement effected the sale of a capital asset on the installment plan, the amounts which the petitioners received from HC&D during the calendar years 1948, 1949, and 1950 were long-term capital gains and taxable as such; and, h) that alternatively, if the Court were to find that the petitioners were dealers in black sand, the petitioners be allowed statutory depletion of natural deposits, in the determination of their taxable incomes for the calendar years 1948, 1949, and 1950.

/s/ E. R. CAMERON,

/s/ H. C. DUNN,

/s/ DORIS E. BENNETT,

Counsel for Petitioners.

Duly verified.

## EXHIBIT A

U. S. Treasury Department  
Office of the District Commissioner  
Internal Revenue Service

Appellate Division—Los Angeles District  
Room 710—630 Sansome Street  
San Francisco 11, California

June 5, 1953.

In Replying Refer To:

ADC-Ap:LA

SF:LVH:DRU-150-D

Mr. Louis L. Gowans and

Mrs. Helen T. Gowans

(Husband and Wife)

2785 Round Top Drive

Honolulu, Hawaii

Dear Mr. and Mrs. Gowans:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1948, December 31, 1949, and December 31, 1950, discloses a deficiency of \$9,561.30 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 150 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address,

Washington 4, D. C., for a redetermination of the deficiency. In counting the 150 days you may not exclude any day unless the 150th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 150th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 150-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant District Commissioner, Appellate, Room 710, 630 Sansome Street, San Francisco 11, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,  
Commissioner;

By /s/ WM. G. WILKER,  
Assistant Head  
Appellate Division.

Enclosures:

Statement  
Form 1276  
Agreement Form

## Statement

ADC-Ap:LA

SF:LVH:DRU-150-Day

Mr. Louis L. Gowans and  
 Mrs. Helen T. Gowans,  
 Husband and Wife  
 2785 Round Top Drive  
 Honolulu, Hawaii

Tax Liability for the Taxable Years Ended December 31, 1948,  
 December 31, 1949 and December 31, 1950.

	Year	Deficiency
Income Tax .....	1948	\$ 2,784.52
<b>Income Tax</b> .....	<b>1949</b>	<b>2,016.86</b>
Income Tax .....	1950	4,759.92
		<hr/>
Total .....		\$ 9,561.30

In making this determination of your income tax liability, careful consideration has been given to your protests dated September 12, 1951, and December 18, 1951; to the statements made at the conferences held on November 25, 1952, and on prior dates; and to your claims for refund filed on February 4, 1952.

If a petition to The Tax Court of the United States is filed against the deficiency proposed herein, the issue set forth in your claims for refund should be made a part of the petition to be considered by The Tax Court in any redetermination of your tax liability. If a petition is not filed, the claims for refund will be disallowed and official notice will be issued by registered mail in accordance with section 3772 of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. E. R. Cameron, c/o Cameron, Tennent & Greaney, P. O. Box 3556, Honolulu 11, Hawaii, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Income  
Year: 1948

Net income as disclosed by return.....		\$14,672.93
Unallowable deductions and additional income:		
(a) Ordinary income from sale of sand .....	\$16,575.63	
(b) Taxes .....	31.20	16,606.83
		<hr/>
Total .....		\$31,279.76
Nontaxable income and additional deductions:		
(c) Net capital gain.....		\$ 7,326.80
		<hr/>
Net income as adjusted.....		\$23,952.96

Explanation of Adjustments

(a) In your income tax returns for calendar years 1948, 1949, and 1950, you have reported as income from the sale of sand the following amounts:

Year	Amount
1948.....	\$14,653.60
1949.....	12,600.00
1950.....	17,086.57

In determining the tax liability on these returns you have treated such income as long-term capital gains and only included 50% of such income in adjusted gross income. In claims for refund, filed February 4, 1952, you have contended that such income was income in the year 1945, the year in which the contract providing for above payments was made, and that you were in error in reporting any part of such income on returns for years 1948, 1949, and 1950.

It is held that the correct amount of payments received under the above-mentioned contract was as follows:

Year	Amount
1948.....	\$16,575.63
1949.....	12,600.00
1950.....	19,867.70

It is further held that such payments did not represent capital gains within the meaning of section 117 of the Internal Revenue Code and that 100% of such payments were includible in the adjusted gross incomes of the years in which the payments were received.

(b) Deductions under taxes of \$30.00 for Federal tax on country club dues and \$1.20 for dog license are disallowed because such items are not deductible under the Internal Revenue Code.

(c) Capital gain of \$7,326.80 (50% of \$14,653.60) reported on your return from the sale of sand is eliminated for the reason set forth in item (a) above.

Computation of Income Tax  
Year: 1948

Net income .....	\$23,952.96	
Less 2 exemptions at \$600 each.....	1,200.00	
Normal tax and surtax net income.....	\$22,752.96	
One-half of normal tax and surtax net income.....	\$11,376.48	
Tentative tax .....		\$ 3,163.06
Less: 17. % on \$ 400.00.....	\$ 68.00	
12. % on \$2,763.06.....	331.57	399.57
Balance .....		\$ 2,763.49
Total income tax— twice the above balance.....		\$ 5,526.98
Income tax liability .....		5,526.98
Income tax liability disclosed by original return Account No. 908505, Dis- trict Hawaii .....		2,742.46
Deficiency in income tax.....		\$ 2,784.52

Adjustments to Net Income  
Year: 1949

Net income as disclosed by return.....		\$18,362.46
Unallowable deductions and additional income:		
(a) Ordinary income from sale of sand .....	\$12,600.00	
(b) Taxes .....	30.00	12,630.00
Total .....		<u>\$30,992.46</u>
Nontaxable income and additional deductions:		
(c) Net capital gain.....		<u>6,300.00</u>
Net income as adjusted.....		\$24,692.46

## Explanation of Adjustments

(a) and (c) Ordinary income of \$12,600.00 from the sale of sand is included in adjusted gross income and net capital gain of \$6,300.00 reported on the sale of sand is eliminated from income as explained in item (a) for the taxable year 1948.

(b) Deduction of \$30.00 for Federal tax on country club dues is disallowed because such item is not deductible under the Internal Revenue Code.

Computation of Income Tax  
Year: 1949

Net income .....	\$24,692.46	
Less 2 exemptions at \$600.00 each.....	1,200.00	
	<hr/>	
Normal tax and surtax net income.....	\$23,492.46	
One-half of normal tax and surtax net income.....	\$11,746.23	
Tentative tax .....		\$ 3,303.57
Less: 17. % on \$ 400.00.....	\$ 68.00	
12. % on \$2,903.57.....	348.43	416.43
	<hr/>	<hr/>
Balance .....		\$ 2,887.14
Total income tax— twice the above balance.....		\$ 5,774.28
Income tax liability.....		5,774.28
Income tax liability disclosed by original return Account No. 3193258, Dis- trict Hawaii .....		3,757.42
		<hr/>
Deficiency in income tax.....		\$ 2,016.86

Adjustments to Net Income  
Year: 1950

Net income as disclosed by return.....		\$25,464.35
Unallowable deductions and additional income:		
(a) Ordinary income from sale of sand .....		19,867.70
		<hr/>
Total .....		\$45,332.05
Nontaxable income and additional deductions:		
(b) Net capital gain.....	\$ 8,543.29	
(c) Mathematical error .....	100.00	8,643.29
	<hr/>	<hr/>
Net income as adjusted .....		\$36,688.76



Explanation of adjustments

(a) and (b) Ordinary income of \$19,867.70 from the sale of sand is included in adjusted gross income and net capital gain of \$8,543.29 reported on the sale of sand is eliminated from income as explained in item (a) for the taxable year 1948.

(c) Dividends, interest and other income were reported on line 3 of your return as \$12,037.54 instead of \$11,937.54 as itemized on page 2 of the return. Accordingly, taxable income is decreased by the difference of \$100.00.

Computation of Income Tax  
Year: 1950

Net income .....			\$36,688.76
Less: 2 exemptions at \$600.00.....			1,200.00
			<hr/>
Income subject to tentative tax.....			\$35,488.76
Income subject to tentative tax if separate return; or one-half of such income if joint return.....			\$17,744.38
Tentative tax .....			\$ 6,072.19
Tax Reduction: \$ 400.00 at 13%.....	\$	52.00	
\$5,672.19 at 9%.....		510.50	562.50
		<hr/>	<hr/>
Combined normal tax and surtax.....			\$ 5,509.69
Multiply amount of combined tax by 2 if joint return.....			\$11,019.38
Balance of income tax liability.....			11,019.38
Income tax liability disclosed by return Account No. 9105106, District Hawaii .....			6,259.46
			<hr/>
Deficiency in income tax.....			\$ 4,759.92

Received and Filed September 4, 1953, T.C.U.S.

Served September 8, 1953.

## [Title of Tax Court and Cause.]

## ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Kenneth W. Gemmill, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner admits, denies and alleges as follows:

I and II. Admits the allegations contained in paragraphs I and II of the petition.

III. Admits the deficiencies as determined by the Commissioner of Internal Revenue are in income taxes for the calendar years 1948, 1949, and 1950, in the aggregate amount of Nine Thousand Five Hundred Sixty-one Dollars and Thirty Cents (\$9,561.30), by years as follows: 1948, \$2,784.52; 1949, \$2,016.86; and 1950, \$4,759.92, and petitioners claim refunds of income taxes for the calendar years 1948, 1949, and 1950, as follows: 1948, \$1,656.92; 1949, \$1,657.22; and 1950, \$2,827.70, a total of \$6,141.84, making a grand total at issue of \$15,703.14.

IV. A-F, inclusive. Denies that the Commissioner erred in the determination of the deficiencies as alleged in paragraph IV of the petition and subparagraphs A to F, inclusive, thereunder.

V. A and B. Admits the allegations contained in paragraph V of the petition and subparagraphs A and B thereunder.

C. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph C of paragraph V of the petition.

D. Admits during the period begun June 1, 1945, and ended June 30, 1949, there was in effect in the Territory of Hawaii a Community Property Law. The said law provided that all property, both real and personal, including the earnings of the husband and the earnings of the wife and including rents, issues, income and other profits of the separate property of the husband and the wife, acquired by the husband or by the wife after marriage or on or after the effective date of the said Act, whichever was the later, should be community property of the husband and wife, and each was vested with an undivided one-half interest therein; denies the remaining allegation contained in subparagraph D of paragraph V of the petition.

E. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph E of paragraph V of the petition.

F. Denies the allegations contained in subparagraph F of paragraph V of the petition.

G. and H. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs G and H of paragraph V of the petition.

I. Admits the Honolulu Construction & Draying Company, Limited, a Hawaiian corporation engaged in business as a general construction contractor and manufacturer of tile, in the City and County of Honolulu, hereinafter referred to as "HC&D," had need for black sand for the manufacture of tile products and for other purposes; admits HC&D determined that a portion of Lot No. 824 and a portion of Lot No. 822, were sources of black sand which it needed in business; admits HC&D offered to purchase in 1944, approximately 4.433 acres of homestead land aforesaid and that HC&D instructed its attorney to prepare a deed to cover the purchase, but said attorney determined that petitioners had not perfected their title to Lot. No. 822 by erecting a residence upon the premises, as required by law; admits furthermore, the attorney for HC&D found that the Hawaiian Organic Act and the statutes of the Territory of Hawaii, governing the sale, lease, or other use or disposition of public lands, permitted the said lots to be used for residence purposes only and prohibited any part thereof, or interest therein or control thereof, without the written consent of the commissioner of public lands and the governor of the Territory of Hawaii, being contracted in any way, directly or indirectly, by process of law or otherwise, conveyed, mortgaged, leased, or otherwise transferred to, or acquired or held by or for the benefit of, any alien or corporation. Denies the remaining allegations contained in subparagraph I of paragraph V of the petition.

J-P, inclusive. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs J to P, inclusive, of paragraph V of the petition.

Q. Admits pursuant to the agreement of May 19, 1950, aforesaid, HC&D paid to Bishop National Bank of Hawaii at Honolulu, during the calendar year 1950, \$753.78 interest on petitioners' note for \$48,960.00, dated May 19, 1950; the Commissioner of Internal Revenue included in his determination of the proceeds which petitioners received during 1950, viz., \$19,126.57, on account of the item of black sand and \$741.13 of the \$753.78 interest which HC&D paid during 1950 for the petitioners' account; and the \$741.13 was an understatement, made by the Commissioner, of the amount of said interest. Denies the remaining allegations contained in subparagraph Q of paragraph V of the petition.

R and S. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs R and S of paragraph V of the petition.

T and U. Denies the allegations contained in subparagraphs T and U of paragraph V of the petition.

V. Admits HC&D withdrew black sand from the "Sand Area" and paid therefor in cash to the petitioners or, at their direction, to their banker, in the manner provided in the Agreement of September 4, 1945, as amended, by years as follows:

Years	Cubic Yards	Cash Payments
1948.....	30,694.50	\$16,575.63
1949.....	40,356.25	12,600.00

Denies the remaining allegation contained in subparagraph V of paragraph V of the petition and specifically denies that for the year 1950, the cash payment received by petitioners was \$19,126.57.

W. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph W of paragraph V of the petition.

X and Y. Denies the allegations contained in subparagraphs X and Y of paragraph V of the petition.

Z. Admits that in their joint income tax return for the calendar year 1948, the petitioners included in their gross income, on account of the black sand, a long-term capital gain of \$7,326.80, which purported to be 50 per centum of \$14,653.60, which HC&D determined was due to the petitioners on account of the black sand and which was payable upon the basis of black sand removed monthly during 1948; denies the remaining allegations contained in subparagraph Z of paragraph V of the petition.

AA. Admits the Commissioner of Internal Revenue determined that the moneys which HC&D paid to petitioners during 1948 pursuant to the Agreement of September 4, 1945, were ordinary income and substituted for the \$7,326.80 which petitioners had returned as aforesaid. \$16,575.63; denies the

remaining allegations contained in subparagraph AA of paragraph V of the petition.

BB. Admits that in their joint income tax return for the calendar year 1949, the petitioners included in their gross income, on account of the disposition of black sand to HC&D pursuant to the Agreement of September 4, 1945, a long-term capital gain of \$6,300.00, which is 50 per centum of the \$12,600.00 that HC&D determined was due to the petitioners on account of the black sand and payable upon the basis of black sand removed monthly during 1949; denies the remaining allegations contained in subparagraph BB of paragraph V of the petition.

CC. Admits the allegations contained in subparagraph CC of paragraph V of the petition.

DD. Admits that in their joint income tax return for the calendar year 1950, the petitioners included in their gross income on account of the disposition of black sand to HC&D pursuant to the Agreement of September 4, 1945, long-term capital gain of \$8,543.29, which purported to be 50 per centum of the \$17,086.57 that HC&D determined was due to petitioners on account of the black sand and payable, upon the basis of black sand removed monthly during 1950; petitioners omitted from their determination of the long-term capital gain which they included in their gross income for 1950, one monthly payment of \$2,040.00 which they received during 1950. Denies the remaining allegations contained in subparagraph DD of paragraph V of the petition.

EE. Admits the Commissioner of Internal Revenue determined that the moneys which HC&D paid to petitioners during 1950 pursuant to the Agreements of September 4, 1945, as amended, and May 19, 1950, were ordinary income and substituted for the \$8,543.29 which petitioners had returned as aforesaid, \$19,867.70, which comprises \$19,126.57 that the petitioners actually received during 1950 on account of the black sand granted to HC&D and payable upon the bases of the Agreements of September 4, 1945, and May 19, 1950, both aforesaid, and \$741.13 of the \$753.78 interest which the petitioners actually received during 1950 pursuant to the Agreement of May 19, 1950; denies the remaining allegations contained in subparagraph EE of paragraph V of the petition.

FF. Denies the allegations contained in subparagraph FF of paragraph V of the petition.

GG. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph GG of paragraph V of the petition.

HH. Admits the allegations contained in subparagraph HH of paragraph V of the petition.

II. Admits the allegations contained in subparagraph II of paragraph V of the petition.

VI. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.



Wherefore, it is prayed that the Commissioner's determination be approved and the petitioners' appeal denied.

/s/ KENNETH W. GEMMILL,  
Acting Chief Counsel,  
Internal Revenue Service.

Filed October 26, 1953, T.C.U.S.

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[Title of Tax Court and Cause.]

### STIPULATION

The petitioners and the respondent by their respective attorneys hereby stipulate to the following facts:

A. The petitioners are husband and wife, citizens of the United States, and residents of the City and County of Honolulu, Territory of Hawaii.

B. Petitioners always have computed their net incomes upon the bases of cash receipts and disbursements and calendar year.

C. Throughout the period begun January 1, 1945, and ended December 31, 1950, as well as prior and subsequent to said period, each of the petitioners has been employed full time by the Honolulu Gas Company, Limited, a public utility, in Honolulu, Hawaii.

D. The petitioners, throughout their lives as husband and wife, have combined their services,

earnings, and capital. Their investments have been joint.

E. Under date of December 28, 1932, the petitioners, as point tenants, purchased from A. V. Gear, under an agreement of sale, a parcel of land, in consideration of \$7,500.00, lot 824, Makiki Round Top Lots, City and Couty of Honolulu, containing an area of three (3) acres, more or less. A. V. Gear had acquired the said lot under the Homestead Laws of the Territory of Hawaii, Land Patent Grant Number 6815, a copy of which is hereto attached as Exhibit I, under date of February 20, 1917. Gear died testate before the purchase price had been paid in full, and devised Lot 824, subject to the Agreement of Sale, to his wife. The widow, Addie B. Gear, died testate under similar circumstances and devised Lot 824, subject to the Agreement of Sale, to her children. The Gears' children, Harold B. Gear and Hazel Gear Raseman, after receipt of payment in full of account of the sale price of said homesite, deeded to the petitioners, on July 5, 1936, Lot 824 aforesaid. A copy of said deed is hereto attached as Exhibit I-A.

F. Petitioners sold 10,018 square feet of Lot 824 aforesaid, facing Round Top Drive, by unrecorded agreement of sale dated April 30, 1946. Upon payment, during 1947, of the final installment of the consideration of \$10,000.00, petitioners executed on October 8, 1947, and delivered to the purchasers, a deed.

G. During September, 1937, the petitioners be-

gan the construction upon Lot 824, Makiki Round Top Lots, at 2785 Round Top Drive, of their home, which they have occupied continuously since its erection. An extension thereto was begun in November, 1944.

H. On February 24, 1938, the petitioners purchased at public auction, under Special Sale Agreement No. 1762, a copy of which is hereto attached as Exhibit II, in consideration of \$8,150.00, in accordance with the provisions of section 73 of the Hawaiian Organic Act and Chapter 54, Revised Laws of Hawaii, 1935, Lot No. 822, Makiki Round Top Lots, City and County of Honolulu, containing two and ninety-seven hundredths (2.97) acres of land. Lot 822 adjoins Lot No. 824, both aforesaid.

I. Honolulu Construction & Draying Company, Limited, a Hawaiian corporation engaged in business as a general construction contractor and manufacturer of tile in the City and County of Honolulu, hereinafter referred to as "HC&D," had need for black sand for the manufacture of tile products and for other purposes. HC&D determined that the portion of Lot No. 824 which was unessential to the petitioners' homesite and the corresponding portion of Lot No. 822 aforesaid, were sources of black sand which it needed in its business. HC&D offered to purchase in fee, in the Fall of 1944, the approximately 4.433 acres of homestead land aforesaid and petitioners were agreeable to the said offer. HC&D instructed its attorney to prepare a deed to cover the purchase, but said attorney determined

that petitioners had not perfected their title to Lot No. 822 by erecting a residence upon the premises, as required by law. Furthermore, the attorney for HC&D found that the Hawaiian Organic Act and the statutes of the Territory of Hawaii governing the sale, lease, or other use or disposition of public lands, permitted the said lots to be used for residence purposes only and prohibited any part thereof, or interest therein or control thereof, without the written consent of the Commissioner of Public Lands and the Governor of the Territory of Hawaii, being contracted in any way, directly or indirectly, by process of law or otherwise, conveyed, mortgaged, leased, or otherwise transferred to, or acquired or held by or for the benefit of, any alien or corporation. Attached hereto as Exhibit III is a copy of a letter addressed to the Commissioner of Public Lands by Petitioner. Attached hereto as Exhibit IV is a copy of the Commissioner's reply thereto.

J. Petitioners and HC&D conceived, subsequently to November, 1944, a plan by means of which HC&D could obtain the black sand which it needed for other commercial purposes and the petitioners could fulfill their obligations under Special Sale Agreement No. 1762, dated February 24, 1938. HC&D employed Rosewell Towill, engineer and surveyor, to determine by survey the volume of black sand contained in the lower parts of adjoining Lots Nos. 822 and 824, to plat the area which would remain after removal of the overburden of black sand,

in accordance with the requirements of the City Planning Commission, City and County of Honolulu, to construct an access road across the land of an abutting property owner, and to install a water pipeline which would be available to petitioners and to the abutting property owners. The said engineer and surveyor determined by metes and bounds and depth that there were approximately 250,000 cubic yards of black sand beneath a surface area of approximately 192,000 square feet of Lots Nos. 822 and 824 and estimated that the cost, in 1945, of grading the land after removal of the black sand, installing a water pipeline, and completing an access road to Round Top Drive would approximate \$32,000.00.

K. Under date of September 4, 1945, to effectuate the plan aforesaid, the petitioners and HC&D executed an Agreement, a copy of which is attached hereto as Exhibit V.

L. HC&D agreed to advance the materials and labor for the construction of a dwelling on Lot No. 822 in order for petitioners to perfect their title upon termination of hostilities in World War II. Construction of the dwelling on Lot No. 822 was begun during January, 1946, and was completed several months later, at a cost to the petitioners of \$19,322.81. To secure HC&D against loss, the petitioners agreed to execute and deliver to HC&D a non-interest-bearing mortgage of the premises notwithstanding the proscription referred to in paragraph I above.

M. Under date of May 23, 1946, the Governor of the Territory of Hawaii duly executed Land Patent No. 11,315, a copy of which is hereto attached as Exhibit VI.

N. Because of the delay experienced by the petitioners in perfecting their title to Lot No. 822 aforesaid, HC&D was delayed, until on or about July 1, 1946, in commencing its performance of the terms of the Agreement of September 4, 1945, aforesaid. Attached hereto are Exhibits VII, VIII, IX, X and XI relating to financial arrangements made in connection with the removal of the black sand.

O. Attached hereto is Exhibit XII, an agreement of May 19, 1950, modifying Exhibit V.

P. Pursuant to the agreement of May 19, 1950, aforesaid, HC&D paid to Bishop National Bank of Hawaii at Honolulu, during the calendar year 1950, \$753.78 interst on petitioners' note for \$48,960.00, dated May 19, 1950. The Commissioner of Internal Revenue included in his determination of the proceeds which petitioners received during 1950, viz., \$19,126.57, as proceeds from said contract, \$741.13 of the \$753.78 interst which HC&D paid during 1950 for the petitioners' account. The \$741.13 was an understatement, made by the Commissioner, of the amount of said interest.

Q. HC&D withdrew black sand from the "Sand Area" under Exhibits V and XII, and paid therefor in cash to the petitoners or, at their direction, to

their banker, in the manner provided in said exhibits by years as follows:

Years	Cubic Yards	Cash Payments
1947.....	35,897.47	\$ 14,358.98*
1948.....	30,694.50	15,463.83*
1949.....	40,356.25	12,600.00
1950.....	44,692.25	19,126.57
1951.....	16,414.50	24,480.00
1952.....	81,955.03	13,974.62
	<hr/>	<hr/>
Totals .....	250,010.00	\$100,004.00
	<hr/>	<hr/>

\*As received by petitioners: \$13,247.18 (1947) ; \$16,575.63 (1948)

R. HC&D completed its performance of the terms of the agreement of September 4, 1945, as amended, during 1952.

S. During the calendar year 1945, the petitioners did not receive from HC&D, neither directly nor indirectly, any payment in cash or its equivalent under the contract of September 4, 1945. The first payment under the agreement of September 4, 1945, was made by HC&D and was received by the petitioners during the calendar year 1947.

T. HC&D reimbursed petitioners for real property taxes paid by petitoners on the "Sand Area" as follows:

Year	Amount
1950 .....	\$276.35
1951 .....	525.96
1952 .....	283.45

U. In their joint income tax return for the calendar year 1948, the petitioners reported, as a sales price of black sand under the Agreement of September 4, 1945, a long-term capital gain of \$7,326.80, which purported to be 50 per centum of \$15,463.83, which HC&D determined was due to the petitioners under the contract and which was payable upon the basis of black sand removed monthly during 1948.

V. The Commissioner of Internal Revenue determined that the moneys which HC&D paid to petitioners during 1948 pursuant to the Agreement of September 4, 1945, were ordinary income and substituted for the \$7,326.80 which petitioners had returned as aforesaid, \$16,575.63, which comprises the \$15,463.84 that was based upon withdrawals of black sand from the "Sand Area" during 1948 and \$1,111.80 that HC&D paid to petitioners during January, 1948, upon the basis of black sand removed during December, 1947.

W. In their joint income tax return for the calendar year 1949, the petitioners reported as the sales price of black sand under the Agreement of September 4, 1945, a long-term capital gain of \$6,300.00, which is 50 per centum of the \$12,600.00 that HC&D determined was due to the petitioners under the contract and payable upon the basis of black sand removed monthly during 1949.

X. The Commissioner of Internal Revenue determined that the moneys which HC&D paid to petitioners during 1949 pursuant to the Agreement of September 4, 1945, were ordinary income and sub-



stituted for the \$6,300.00 which petitioners had returned as aforesaid, \$12,600.00 which the petitioners had actually received from HC&D during the calendar year 1949 upon the basis of black sand removed during 1949.

Y. In their joint income tax return for the calendar year 1950, the petitioners reported as the sales price of black sand under the Agreement of September 4, 1945, a long-term capital gain of \$8,543.29, which purported to be 50 per centum of the \$19,126.57 that HC&D determined was due to the petitioners under the contract and payable, until May 19, 1950, upon the basis of black sand removed monthly during 1950. Commencing June 20, 1950, payments were made pursuant to the agreement between HC&D and taxpayers which is Exhibit XII. Petitioners inadvertently omitted from gross income reported for 1950, one monthly payment of \$2,040.00 which they received during 1950.

Z. The Commissioner of Internal Revenue determined that the moneys which HC&D paid to petitioners during 1950 pursuant to the Agreements of September 4, 1945, as amended, and May 19, 1950, were ordinary income and substituted for the \$8,543.29 which petitioners had reported as a long-term capital gain \$19,867.70, which comprises \$19,126.57 that the petitioners actually received during 1950 on account of the black sand from HC&D and payable upon the bases of the Agreements of September 4, 1945, and May 19, 1950, both aforesaid, and \$741.13 of the \$753.78 interest which the petitioners

actually received during 1950 pursuant to the Agreement of May 19, 1950.

AA. Petitioners duly filed with the Collector of Internal Revenue, District of Hawaii, claims for the refund of income taxes allegedly overassessed and overpaid for the calendar years 1948, 1949 and 1950, in the amounts respectively of \$1,656.92, \$1,657.22 and \$2,827.70, on the ground that they had erred in including in their gross incomes for the calendar years aforesaid, long-term capital gains which they had purportedly realized during a calendar and taxable year prior to 1948, namely, during the calendar year 1945.

BB. The petitioners had not claimed, and the Commissioner of Internal Revenue has not allowed, in the determination of the petitioners' taxable net income for the calendar years 1948, 1949 and 1950, any depletion of natural deposits, as provided in any provision of the Internal Revenue Code.

CC. Attached hereto as Exhibits XIII, XIV and XV are the tax returns filed by the petitioners for the calendar years 1948, 1949 and 1950 respectively.

Dated: Honolulu, T. H., July 15, 1954.

/s/ FRANK D. PADGETT,  
Counsel for Petitioners;

/s/ DANIEL A. TAYLOR,  
Chief Counsel, Internal Revenue Service, Counsel  
for Respondent.

Filed at hearing July 22, 1954.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT  
AND OPINION

Respondent determined deficiencies in petitioners' income tax for the years and in the amounts as follows:

Year	Amount
1948 .....	\$2,784.52
1949 .....	2,016.86
1950 .....	4,759.92

The primary question presented is whether for each of the taxable years involved the payments received by petitioners under certain written agreements were proceeds from the sale of a capital asset or royalty payments taxable as ordinary income. Alternatively, if the latter, whether petitioners are entitled to depletion deductions and, if the former, whether the gain is taxable in 1945, which year is barred by the statute of limitations.

Petitioners claim they are entitled to a refund for the taxable years 1948, 1949 and 1950 in the amounts of \$1,656.92, \$1,657.22 and \$2,827.70, respectively.

Findings of Fact

The stipulated facts are found accordingly.

The petitioners, husbands and wife, are and were at all material times herein, citizens of the United States and residents of the city and county of Honolulu, Territory of Hawaii. They filed their joint

individual income tax returns for 1948, 1949 and 1950 on the cash basis with the collector of internal revenue for the district of Hawaii.

At the beginning of the taxable year 1948, petitioners were the owners of lots 822 and 824, which were adjoining, Makiki Round Top Lots, Honolulu. Lot 824, containing approximately three acres of land, was acquired by petitioners in December, 1932. In September, 1937, petitioners erected their home on lot 824 and have occupied it continuously since its erection. Lot 822, containing approximately 2.97 acres, was purchased by petitioners at public auction in February, 1938, for the sum of \$8,150, subject to the Hawaiian Organic Act and Chapter 54, Revised Laws of Hawaii, 1935. The lots were situated on a ridge or hillside, and portions of the lots were so steep as to require extensive grading before they could be improved by buildings. By virtue of quarrying in the area surrounding lots 822 and 824, petitioners were aware that portions of their land contained black sand, a volcanic deposit or material used in the construction of cinder and concrete building blocks.

The Honolulu Construction and Draying Company, Limited, hereinafter referred to as Draying Company, is a Hawaiian corporation engaged in business as a general construction contractor and manufacturer of tile.

In the fall of 1944, Draying Company approached petitioners with an offer to purchase that portion

of lot 824 unessential to petitioners' homesite and the corresponding portion of lot 822, totaling approximately 4.4 acres, each lot being a source of black sand. In preparing the deed of sale it was ascertained that petitioners had not perfected title to lot 822 by erecting a residence upon the premises, as required by law. It was also ascertained that the Hawaiian Organic Act and the statutes of the Territory of Hawaii governing the sale, lease or disposition of public lands permitted the lots to be used for residential purposes only, and prohibited, without the written consent of the Commissioner of Public Lands and the Governor of the Territory of Hawaii, such land being contracted in any way, directly or indirectly, by process of law or otherwise, conveyed, mortgaged, leased or otherwise transferred to, or acquired or held by or for the benefit of, any alien or corporation.

By a letter dated November 29, 1944, petitioners requested the permission of the Commissioner of Public Lands to assign the lower portion of lot 822, still unimproved, to Draying Company on the condition that a house be constructed thereon or a \$2,500 bond be posted. Permission was denied on the ground that under the land patent laws, lot 822 was restricted to residential use and commercialization of a portion of the lot could not be permitted in order to erect the required dwelling.

Subsequent to November, 1944, petitioners and officers of Draying Company conceived a plan by means of which the latter could obtain the black

sand which it needed for commercial purposes and petitioners could fulfill their obligations of the 1938 agreement of sale with respect to lot 822, namely, the erection of a dwelling house upon the premises. Draying Company employed Rosewell Towill, an engineer and surveyor, to determine by survey the volume of black sand contained in the lower portions of lots 822 and 824 which it was economically feasible to remove from such sand area, while at the same time leaving the area graded for use as a subdivision. Such subdivision grading was to conform to the requirements of the City Planning Commission, city and county of Honolulu.

Towill's survey estimated that there were approximately 250,000 cubic yards of black sand beneath the surface of approximately 192,000 square feet of the so-called sand area, which constituted the minimum amount that would have to be removed in order to grade for the subdivision and to install roadways therein. Towill's survey further estimated that it would cost approximately \$32,000 to grade the area conformable to the subdivision requirements after removal of the overburden and the installation of a water pipeline and an access road over the land of an abutting owner.

On September 4, 1945, petitioners and Draying Company entered into a written agreement which provided in pertinent part as follows:

This Agreement made this 4th day of September, 1945, by and between Louis L. Gowans and Helen

T. Gowans, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter called the "Seller," and Honolulu Construction and Draying Company, Limited, a Hawaiian corporation, hereinafter called the "Buyer."

Witnesseth: That

Whereas the Seller is the owner of or has a certain interest in Lots 822 and 824 of the Makiki Round Top Lots; and

Whereas a portion of said two lots comprises an area of approximately 192,000 square feet, hereinafter called the "Sand Area," as shown on a survey recently prepared by R. Towill; and

Whereas, Buyer has estimated that the Sand Area has within it approximately 250,000 cubic yards of black sand which the Buyer wishes to acquire for business purposes; and

Whereas, it is feasible and desirable to remove approximately 250,000 cubic yards of black sand from the Sand Area, and with proper grading thereafter to leave the Sand Area in a condition practicable and usable for home building sites, provided a 30-foot roadway can be obtained over and across certain intervening land owned by Fusao Hasegawa and Yoshiko H. Eguchi leading from the said area out to Round Top Drive; and

Whereas the Seller is presently negotiating with said Hasegawa and Eguchi for such a 30-foot roadway; and

Whereas the Buyer is ready and willing either to buy the interest of the Seller in the land comprising the Sand Area, or to quarry, buy and haul away black sand therefrom, and the Seller is ready and willing to sell same subject to prior consent thereto being given by the Commissioner of Public Lands, upon the terms and conditions hereinafter set forth;

Now Therefore, in consideration of the premises and the agreements hereinafter set forth on the part of the Seller and Buyer to be observed and performed, the Seller and Buyer agree as follows:

The Buyer hereby covenants and agrees to and with the Seller, his heirs and assigns:

1. To procure, at its own expense, a survey plan of subdivision of the Sand Area locating and showing thereon also a 30-foot roadway leading from the Sand Area over and across land owned by said Hasegawa and Eguchi to Round Top Drive;

2. With the consent of the Commissioner of Public Lands first obtained, to purchase all the right, title and interest of the Seller in and to the Sand Area, and to pay the Seller therefor the purchase price of Fifty Cents (50c) per square foot of land within the Sand Area according to said survey;

3. If the consent of the Commissioner of Public Lands to purchase the said interest of the Seller in and to the Sand Area cannot be obtained, but if permission to quarry and withdraw black sand from



the Sand Area is obtained within a reasonable time after the date hereof, then the Buyer will quarry and haul away from the Sand Area approximately 250,000 cubic yards of black sand and will pay Seller therefore at the rate of Forty Cents (40c) per cubic yard for all black sand so withdrawn, on the following terms:

(a) To pay the Seller on or before the 15th day of each month for all black sand withdrawn during the month prior thereto;

(b) To keep accurate books of account and upon request to permit the Seller to examine the same;

(c) To save harmless the Seller from all loss, costs, damages, claims or suits of whatsoever nature resulting directly or indirectly from the operation of quarrying and removing black sand;

(d) Within five (5) years from the date hereof to quarry and remove approximately 250,000 cubic yards of black sand from the Sand Area;

\* \* \*

Draying Company further agreed that upon removal of the black sand as provided above, it would, before the expiration of five years, complete the **grading of the subdivision lots** in accordance with plans approved by the City Planning Commission and also grade and pave an access road and install a water pipeline to be available to abutting property owners.

In September, 1945, preliminary approval for the subdivision and the grading levels was obtained from the Planning Commission.

In order to aid petitioners in perfecting their title to lot 822, Draying Company agreed to build a house thereon.

Petitioners executed a noninterest-bearing mortgage to Draying Company to secure the transaction. Construction of the house began in January, 1946, and on completion in May of the same year a land patent for lot 822 was issued to petitioners. The house cost \$19,322.81 to build. Draying Company was reimbursed through credits to petitioners' account as royalties were earned. Payment of the total amount was completed in May, 1948.

Because of the delay until May, 1946, experienced by the petitioners in perfecting their title to lot 822, the corporation was delayed until July 1, 1946, in commencing performance under the 1945 agreement. In the removal of the black sand Draying Company was permitted to take quantities below the grade level where it was of usable quality and to fill the resulting holes to grade level with non-usable material.

In August, 1947, petitioner executed a note with the Bishop National Bank of Hawaii, promising to pay \$70,000 in monthly installments of \$1,050 each. In September, 1947, petitioners assigned to the Bishop National Bank of Hawaii their rights in the

1945 agreement with the corporation as security for the \$70,000 note. Draying Company was willing to make the payments to the bank at such uniform rate since the parties had an oral understanding that production would be kept at an even pace over the five-year period called for by the 1945 agreement. Draying Company requested an extension of the five-year period for removal of the sand from September 4, 1945, to five years from July 1, 1946, when effective removal operations actually began as a result in the delay of petitioners' perfecting title to lot 822.

On May 19, 1950, petitioners and Draying Company entered into a written agreement which provided in pertinent part as follows:

This Agreement, made this 19th day of May, 1950, by and between Honolulu Construction and Draying Company, Limited, a Hawaiian corporation, of Honolulu, T. H., hereinafter called the "Buyer," of the first part, Louis L. Gowans and Helen T. Gowans, husband and wife, of Honolulu aforesaid, hereinafter called the "Sellers," of the second part,

Whereas, the Buyer and the Sellers made and executed a certain agreement dated September 4, 1945, unrecorded, hereinafter called "sand agreement," in which agreement the Buyer was given the right and has agreed to take approximately 250,000 cubic yards of black sand from a 4.433 acre area known as the Sand Area being a portion

of Lots 822 and 824 of the Makiki Round Top lots, Honolulu, T. H., being also a certain portion of L.P. Grants 11315 and 6815, area 4.433 acres, as more particularly described in a certain mortgage made by the Sellers to Bishio National Bank of Hawaii at Honolulu, dated August 21, 1947, recorded in the Hawaiian Registry of Conveyances in Book 2064, page 116, owned by the Sellers; and

Whereas, under said agreement the Buyer is authorized and is hereby authorized to enter upon and to take and remove therefrom Black sand on payment of a royalty of forty cents (40c) per cubic yard for black sand so removed, and is obligated to construct certain improvements on the said lands after removal of the black sand; and

Whereas, the said sand agreement as amended (by unrecorded amendment) provides for removal of the black sand and completion of certain improvements on or before July 1, 1951; and

Whereas, it has become essential in the interests of the Buyer's business and necessary to its business program in connection with its use of black sand that the Buyer have an extension of one year within which to exercise its rights, take black sand and to complete construction of the improvements provided for in the said sand agreement; and

Whereas, the Buyer still has the right and obligation to remove approximately 133,000 cubic yards of black sand upon royalty payment of forty cents (40c) per cubic yard; and

Whereas, the Sellers desire to obtain a loan from the Bishop National Bank of Hawaii at Honolulu, hereinafter referred to as the "Bank," in the amount of Forty-eight Thousand Nine Hundred Sixty Dollars (\$48,960.00); and

Whereas, the Sellers are willing to grant an extension of one year to enable the Buyer to exercise its rights and perform its obligations under the said agreement upon the following terms and conditions:

Now Therefore, in consideration of the premises and of One Dollar (\$1.00) each to the other paid, the receipt whereof is hereby acknowledged, and of the terms and agreements on the part of the Buyer and Sellers hereinafter set forth to be observed and performed, the Buyer and the Sellers do hereby mutually agree that the above mentioned said agreement dated September 4, 1945, be and the same is hereby amended on the following terms and conditions:

(a) The time for completion of the provisions of the said said agreement is hereby further extended for one year from July 1, 1951, to and including July 1, 1952:

(b) The Sellers will execute and deliver to the Bank their joint and several promissory note dated May 19, 1950, in the principal amount of \$48,960.00 payable on demand after date with interest at the rate of three per cent (3%) per annum payable

monthly on diminishing balances of principal, which note shall be endorsed by the Buyer:

(c) As further consideration for the one year extension. Buyer agrees to pay the interest on the unpaid balance of principal of said note accruing after the 19th day of May, 1950, and real property taxes attributable to the said 4.433 acre sand area for the period May 1, 1950 to June 30, 1952:

(d) Commencing June 20, 1950, all royalty payments for black sand removed from said 4.433 acre sand area are hereby irrevocably assigned to the Bank as security for the repayment of said note and shall be made by the Buyer to the Bank at the rate of \$2,040.00 per month and applied by the Bank on principal against the above-mentioned note; and upon payment in full of said note all further payments of royalty shall be made to the Sellers:

\* \* \*

In order to meet the deadline of July 1, 1952, as set forth in the above agreement. Draying Company, in 1952, rented extra land and stockpiled approximately 100,000 cubic yards of black sand.

In 1952 Draying Company finished its operation of removing black sand from petitioners' property. Sand removed and payments made therefor during the years 1947 to 1952, inclusive, are as follows:

Years	Cubic Yards	Cash Payments
1947.....	35,897.47	\$ 14,358.98 <sup>1</sup>
1948.....	30,694.50	15,463.83 <sup>1</sup>
1949.....	40,356.25	12,600.00
1950.....	44,692.25	19,126.57 <sup>2</sup>
1951.....	16,414.50	24,480.00
1952.....	81,955.03	13,974.62
<hr/>		<hr/>
Total .....	250,010.00	\$100,004.00

The above payments were charged on the books and records of Draying Company to royalty accounts either as prepaid or accrued, dependent upon the amount of black sand actually removed during the period of payment. In its correspondence with petitioners concerning payments Draying Company regularly referred to the payments as royalties.

On their income tax returns for 1948 to 1950, inclusive, petitioners reported the respective amounts of \$14,653.60, \$12,600, and \$17,086.57 as long-term capital gain from the sale of a capital asset taxable at the rate of 50 per centum. In determining his deficiency respondent increased the amounts reported and held that the full amounts were taxable as ordinary income.

For each of the taxable years 1948, 1949, and 1950, petitioners did not claim and respondent did not allow any amount for depletion of the black sand.

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<sup>1</sup>As received by petitioners: \$13,247.18 (1947); \$16,575.63 (1948).

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<sup>2</sup>Commencing June 20, 1950, payments were made by Draying Company pursuant to the agreement of May 19, 1950.

During each of the taxable years 1948, 1949, and 1950 petitioners retained an economic interest in the black sand in place contained on their lots.

In the taxable years 1948, 1949, and 1950, the petitioners received from their black sand contracts the respective amounts of \$16,575.63, \$12,600, and \$19,867.70, which are taxable as ordinary income.

### Opinion

LeMire, Judge:

The first question presented is whether for each of the taxable years involved the amounts received by petitioners from Draying Company were taxable as capital gain or as ordinary income. Petitioners contend that under the agreement of September 4, 1945, as amended by the agreement of May 19, 1950, they sold their interest in 250,000 cubic yards of the black sand contained in the so-called sand area of lots 822 and 824 and hence were entitled to treat the proceeds received as capital gain. Respondent contends that petitioners retained an economic interest in the black sand and that the payments for the extraction thereof constituted ordinary income.

Since the filing of the briefs herein this Court has rendered an opinion in the case of Crowell Land & Mineral Corp., 25 T.C. 223, on appeal C.A. 5, involving a similar factual situation with respect to sand and gravel. See also, Arthur S. Barker, 24 T.C. 1160, on appeal C.A. 2. We held that the proceeds received under the facts there in



controversy were taxable as ordinary income. We are of the opinion that the material facts in the instant case are not distinguishable from the facts in the Crowell case; therefore, that case is controlling here. Accordingly, we sustain the respondent's determination that the proceeds received by petitioners are taxable as ordinary income.

Petitioners' alternative contention is that if the proceeds constitute ordinary income they are entitled to a deduction of "statutory" depletion in each of the taxable years. While petitioners assigned as error the failure to allow depletion, although none was claimed on the returns filed, petitioners present no such argument on brief, and they may be deemed to have abandoned such contention. Assuming, however, there has been no intentional abandonment of the issue, we find no merit in the contention. There is no evidence relative to discovery depletion. It was not until 1951 that percentage depletion with respect to sand and gravel was given statutory recognition. Section 319(a) of the Revenue Act of 1951 amended section 114(b)(4) of the Internal Revenue Code of 1939, relating to percentage depletion, so as to include sand and gravel, and by section 319(c) the amendment was made effective as of January 1, 1951.

\* Decision will be entered under Rule 50.

Received May 17, 1956.

Filed May 31, 1956, T.C.U.S.

Entered June 1, 1956.

Served June 1, 1956.

The Tax Court of the United States  
Washington

Docket No. 50427

LOUIS L. GOWANS and HELEN T. GOWANS  
(Husband and Wife),

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the Court's Memorandum Findings of Fact and Opinion, filed May 31, 1956, the respondent filed a computation which the petitioners agree is in accordance with the opinion. Therefore, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1948, 1949, and 1950 in the respective amounts of \$2,784.52, \$2,016.86, and \$4,759.92.

[Seal]      /s/ C. P. LeMIRE,  
Judge.

Entered July 5, 1956.

Served July 6, 1956.

In the United States Court of Appeals  
For the Ninth Circuit

No. 50427

LOUIS L. GOWANS and HELEN T. GOWANS,  
Husband and Wife,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent on Revenue.

PETITION TO REVIEW DECISION  
OF THE TAX COURT

Now come Louis L. Gowans and Helen T. Gowans, husband and wife, by Frank D. Padgett, their attorney, and petition the United States Court of Appeals for the Ninth Circuit for a review of the decision of the Tax Court of the United States rendered and entered on July 5, 1956, in cause No. 50427 on the docket of said Tax Court wherein they were petitioners and the Commissioner of Internal Revenue was respondent, and in support of their petition respectfully show this honorable court as follows:

Venue

The petitioners are and were individual and inhabitants of the judicial circuit of this honorable court. The income tax returns of the petitioners for each of the taxable years 1948, 1949 and 1950 were filed in the office of the Collector of Internal

Revenue for the District of Hawaii, which office is and at the time the said returns were filed was located at Honolulu and within said judicial circuit.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

### Prior Proceedings

The Commissioner determined the deficiencies in income tax for said taxable years as follows:

1948 .....	\$2,784.52
1949 .....	2,016.86
1950 .....	4,759.92

Petitioners, on the other hand, claimed that they had made overpayments in the years in question as follows:

1948 .....	\$1,656.92
1949 .....	1,657.22
1950 .....	2,827.70

Petitioners filed their petition with the tax court of the United States in order to determine the controversy. The hearing of said petition by the Tax Court was held in Honolulu, Hawaii, on July 22, 1954. On May 31, 1956, the tax appeal court promulgated its findings of fact in opinion on said petition upholding the respondent's contentions.

### Nature of the Controversy

This case arises out of respondent's determination of deficiencies in petitioners' income tax return for the calendar years 1948, 1949, and 1950 respectively. The specific income items in question were monies received by petitioners during those years on account of black sand, a mineral, removed from their land under contracts dated September 4, 1945, and May 19, 1950, with the Honolulu Construction & Draying Company, Limited.

Petitioners claim that the sand was a capital asset sold in place by them, the receipts for which were long-term capital gains under the then Section 117 of the Internal Revenue Code.

Respondent contends that the agreements were in the nature of a lease, that petitioners retained an economic interest in the sand and that the receipts were ordinary income under the then Section 22, Internal Revenue Code.

Petitioners have filed claims for refund of taxes paid on the sand receipts during the years in question, on the ground that the sale occurred in 1945 and that since no down payment was made that year, they erred in not returning the whole price of the sand as capital gain in that year pursuant to the then Section 44 (b) of the Internal Revenue Code.

Wherefore petitioners ask that the decision and order of the Tax Court of the United States be reversed by the United States Court of Appeals

for the Ninth Circuit and that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that errors complained of may be reversed and corrected by said court.

Dated: Honolulu, Hawaii, July 18, 1956.

/s/ FRANK D. PADGETT.

Attorney for Petitioners on  
Review.

ROBERTSON, CASTLE & AN-  
THONY,  
Of Counsel.

Received and Filed July 20, 1956, T.C.U.S.

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[Title of Court of Appeals and Cause.]

## STATEMENT OF POINTS ON APPEAL

Petitioners say that in the record and proceedings before the Tax Court of the United States and in the decision and final order made and rendered in said cause by the Tax Court, manifest errors occurred and intervened to the prejudice of the petitioners as follows:

(1) The Tax Court erred in not holding as a matter of law that the agreement of September 4, 1945, constituted a sale of the black sand in place and that therefore petitioners thereafter retained no economic interest in such sand.

(2) The Tax Court erred in holding as a matter of law that economic interest was retained in the sand after the agreement of May 19, 1950, by petitioners.

(3) The Tax Court erred in not holding as a matter of law that since the agreement of September 4, 1955, was a sale and no initial payment was then made, petitioners should be refunded taxes paid in 1948, 1949, and 1950 on account of income received from the sand.

(4) The Tax Court erred in holding as a matter of law that the petitioners retained an economic interest in the black sand present in place on their lots in 1948, 1949, and 1950.

(5) The Tax Court erred in holding as a matter of law that the receipts from black sand in 1948, 1949, and 1950 by petitioners in the amounts of \$16,573.63, \$12,600.00 and \$19,867.70, respectively were taxable as ordinary income.

(6) The Tax Court erred in failing to hold as a matter of law that since the petitioners received the total amount of \$48,960.00 for the black sand remaining in place on their premises on May 19, 1950, through the device of a bank loan which the Honolulu Construction & Draying Company, Limited, guaranteed, that they thereafter retained no economic interest in the sand.

(7) The Tax Court erred in sustaining respondent's determination of additional taxes due in 1948, 1949 and 1950.

Dated: Honolulu, Hawaii, July 18, 1956.

/s/ FRANK D. PADGETT.

Attorney for Petitioners on  
Review.

ROBERTSON, CASTLE & AN-  
THONY,  
Of Counsel.

Received and Filed July 20, 1956, T.C.U.S.

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In the Tax Court of the United States

Docket No. 50427

LOUIS L. GOWANS and HELEN T. GOWANS,  
Petitioners,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

District Court, Federal Building,  
Honolulu, T. H.,

Thursday, July 22, 1954.

The above-entitled matter came on for hearing,  
pursuant to notice to the parties, at 9:30 o'clock a.m.

Before: Honorable Clarence P. LeMire, J.,  
Presiding.



Appearances:

FRANK PADGETT, ESQ.,

For the Petitioners.

DONALD P. CHEHOCK, ESQ.;

(HON. KENNETH W. GEMMILL,

(Acting Chief Counsel, Bureau of Internal  
Revenue),

For the Respondent.

### PROCEEDINGS

The Clerk: The next case is the appeal of Louis L. Gowans and Helen T. Gowans, Husband and Wife, No. 50427.

Will you state your appearances for the record?

Mr. Padgett: Frank Padgett for the petitioners.

Mr. Chehock: Donald P. Chehock for the respondent.

The Court: Is there a stipulation of facts to be filed in this case?

Mr. Padgett: Yes, there is, your Honor. Mr. Chehock has the original.

Mr. Chehock: Your Honor, there is a written stipulation of facts, which both parties would like to file at this time, which includes Exhibits I to XV, inclusive.

The Court: Very well, the stipulation with the exhibits attached is received in evidence.

(The stipulation with exhibits attached was thereupon received in evidence.)

The Court: You may proceed with your statement, Mr. Padgett:

### OPENING STATEMENT ON BEHALF OF PETITIONERS

Mr. Padgett: Your Honor, this is a case, which boils down simply to a dispute between the petitioners and [3\*] the Government as to whether a transaction involving certain minerals, to wit: black sand, was a sale of that mineral in place, or was a lease or royalty agreement, which would make it ordinary income.

The stipulation of facts reveals the various matters that were done, and the documents which were signed, and many of the other things that were done, and we have some additional evidence to present on the subject; and if time permits, we would ask the Court if we could take the Court up to the premises in question, and give the Court a view of the premises. The reason for that is, your Honor, that, in a case like this, it is very easy to think of the property involved as being like a quarry or mine or a hole in the ground. This is a little different situation, in that this is a section cut out of the mountain, and graded and made into residential property.

The Court: Well, during the recess, the Court has visited some of those black sand deposits up on the Big Island. Would that give me an idea of what they are?

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Padgett: I don't believe so, your Honor. This is a little different situation. I think the witnesses will explain it to you as we go along, then your Honor can decide whether it would be of any value to the Court to visit the property.

The Court: Well, I think I will hear the testimony, [4] and after we conclude the case, if I reach the conclusion that it might be beneficial, and we have time this afternoon and it is not too distant, we might go out and take a look at it.

Mr. Padgett: Very well, your Honor.

The Court: You may make your opening statement, Mr. Padgett.

Do you have anything that you want to add to that, Mr. Chehock?

Mr. Chehock: No, I do not have anything to say.

The Court: I thought you might express some view as to whether it would be beneficial to the Court to view the premises?

Mr. Chehock: Petitioners' counsel asked me about that, your Honor, and I have told him I would have no objection whatever. I do have some doubt about whether it would be helpful, or not.

The Court: Very well. The Court will be very glad to have a brief statement of your facts in the case.

Mr. Padgett: Your Honor, this is a case in which the petitioner was the owner of certain property, which he had purchased, two lots, one by deed of conveyance and one direct from the Territory of Hawaii.

The title to those premises was by statute of [5]

the Hawaii Organic Act, Section 73-B, Chapter 54 of the Revised Laws of Hawaii, of 1945, and the premises had to be used for residential purposes.

Moreover the Organic Act prevents the sale of such land to any alien or corporation.

Sometime in 1944, he was approached by the Honolulu Construction and Draying Corporation, who were interested in the black sand on the premises.

Now, black sand is volcanic deposit, which looks like cinders, but is an organic type mineral, and is used very extensively here in construction for cinder blocks, things of that nature.

There was a considerable deposit on this land. This particular area, on the mountainside is very steeply sloped, so that it was incapable of having residences constructed at that time on the particular portion of the premises where the black sand deposit was.

The petitioners were approached by the Honolulu Construction and Draying Company, which makes cinder blocks, and do construction work, and was very interested in this material, with the idea that they would purchase this land.

This was agreeable to the petitioners, and the matter was turned over to the attorney for the Honolulu Construction and Draying Company to prepare a deed. The attorney for the Honolulu Construction and Draying Company [6] would not prepare the deed, because of the restriction of the land for residential purposes and the restriction against a corporation owning the land, preventing

the Honolulu Construction and Draying Company from taking title.

In addition, the second of the two lots purchased did not as yet have a dwelling constructed thereon. All the petitioners had was a special sales agreement, which made it necessary that a dwelling be constructed on the land.

The petitioners wrote to the Commissioner of Public Lands of the Territory of Hawaii, asking permission to make a sale to the Honolulu Construction and Draying Company. The exchange of correspondence is attached as an exhibit to the stipulation. They were turned down. This was in late 1944.

Thereafter, in 1945, pursuant to a conference between Mr. Bush of the Honolulu Construction and Draying Company, and Mr. Gowans, the petitioner, a scheme was hit upon of a sort of two-stage transaction, whereby the Honolulu Construction and Draying Company would enter into an agreement to take out the black sand on the premises and leave the land graded for a subdivision, so that the petitioners might be able to sell off the land, itself.

The only thing we are concerned with here in this case is the black sand. This was turned over to a surveyor, Mr. Towill, and Mr. Towill made a survey, and determined the [7] amount of black sand available, determined the feasibility of a subdivision, and they prepared preliminary subdivision plans, which included also the opinion that it was necessary for a right-of-way to be obtained from the adjoining property owner, in order to put a

road into the premises, if there was to be a subdivision there. That was a requirement of the Planning Commission.

Mr. Bush of the Honolulu Construction and Draying Company negotiated with the owner of that land, and obtained the right-of-way. Then in early September of 1945, an agreement was entered into between the Honolulu Construction and Draying Company and the petitioner.

Now, that agreement provides that, as the black sand is taken out, the petitioners will be paid by the Honolulu Construction and Draying Company some forty cents a cubic yard, and they are to complete taking it out within five years.

Now, the reason for that, it is out contention, and by our evidence we will seek to establish that the time limitation was in order to enable them to go ahead with the subdivision. In other words, there wouldn't be any use in making an agreement to take out the sand and make a subdivision, if they didn't take out the sand; so there was a time limitation put on it; and the agreement also recited the necessity of obtaining the right-of-way [8] and other pertinent facts.

Now, at the time, the petitioners had not yet perfected title to one of the lots; so the first thing that was done was that the Honolulu Construction and Draying Company, at a cost to itself of approximately \$19,000, built a residence for them on a portion of the lot. They then were able to obtain a land patent on the area, that then delayed the commencement of the operations about a year.

Then the Honolulu Construction and Draying Company went on what is called the sand area and started taking out the sand. This was sometime in 1947.

As they began to remove the sand, they credited forty cents per cubic yard against the \$19,000-some odd, that had been expended in constructing the residence.

Shortly before they finished taking all of that off, the petitioners entered into an agreement with the Bishop Bank, whereby they borrowed a substantial sum of money, and obligated themselves to pay \$1,050 per month to the bank. This was early in 1947, when they made the note to the bank, but early in 1948 the bank began to pay at the rate of \$1,050 a month, regardless of the amount of sand taken out; and during that period Honolulu Construction and Draying Company was paying for more than the sand taken out. In other words, the sand was always behind the payments to the [9] bank.

That situation pertained until May or June of 1950, when the petitioners entered into another agreement with the Bishop Bank, signed a new note, whereby they obligated themselves to pay \$2,040 to the bank. They made an assignment of any proceeds due them under this so-called sand contract with the bank, and at that time the sand contract was modified, to provide that the Honolulu Construction and Draying Company would pay \$2,040 per month during the remainder of the agreement.

The agreement was extended approximately one year, or a little better, at that time, and the Honolulu Construction and Draying Company was to pay \$2,040 per month, regardless of the amount that they took out.

The Honolulu Construction and Draying Company endorsed the petitioners' note to the bank. They then continued the agreement until 250,010 cubic yards of black sand had been taken out. Now, the original agreement called for approximately 250,000 cubic yards to be removed. At that point, they ceased removing the black sand, and put in the subdivision improvements, and sold the subdivision land to someone else.

That is substantially the way the agreement worked out.

The petitioners returned their receipts under the black sand agreement under the capital gains provision, [10] and the Government contends it was ordinary income. They got receipts in the years 1947, 1948, 1949, 1950, 1951 and 1952, and the years 1948, 1949 and 1950 are involved here.

The Court: Very well.

## OPENING STATEMENT ON BEHALF OF THE RESPONDENT

Mr. Chehock: May it please the Court, the petitioners' counsel has gone over the facts that have already been stipulated, and I will try to make a short statement.

The petitioners here, your Honor, two individuals,



are husband and wife, Louis L. Gowans and Helen T. Gowans.

The petitioners' years before the Court are 1948, 1949 and 1950. The years involved, the six years involved with these minerals cover the period of 1947 to 1952, inclusive, in which six years, as counsel has stated, approximately 250,000 cubic yards of sand was quarried and removed from the premises owned by the petitioners.

During the years here before the Court, 1948, 1949 and 1950, there was approximately \$16,575 received by the petitioners under these agreements in 1948; \$12,600 in 1949 and \$19,126 in 1950, for approximately 30,000 cubic yards of black sand extracted in 1948, 40,000 cubic yards extracted in 1949 and approximately 44,000 cubic yards in 1950. [11]

The deficiency here in controversy results from the fact that, as counsel has stated, the petitioners have reported these amounts as long-term capital gains, while the Commissioner has determined them to be ordinary income.

Consequently, the issue before the Court is whether these amounts received by the petitioners from the Honolulu Construction and Draying Company, Ltd., under the agreements of September 4, 1945, and May 19, 1950, during taxable years before the Court, 1948, 1949 and 1950, constitute ordinary income of the petitioners, or, on the other hand, are long-term capital gains as reported.

There are a number of reasons, your Honor, why the payments here do not qualify under the capital

gains provision, as indicated in the pleadings, and which will be fully developed in the briefs.

There is one obvious reason, your Honor, the respondent maintains, why these payments do constitute ordinary income, and that is because this case, in the respondent's view, fits squarely within the import of the oil and gas and mineral lease cases, starting with the Supreme Court case of *Burnett v. Harmel*, and *Palmer v. Bender*, and continuing down a long line of decisions, including mineral leases, including the recent Fourth Circuit decision decided in December, 1953, of *Hamme [12] v. Commissioner*.

While the petitioners tried to distinguish it, it is the respondent's belief, and I believe the Court will so view the evidence, that this is a typical type of mineral leases, wherein the amounts to be received by the petitioners are based upon the amount of sand or minerals extracted; in other words, forty cents per cubic yard; it is a typical type of lease in which the privilege is granted the developer for mining and extracting minerals and, consequently, the payments come within the category of these mineral lease cases, in which the petitioner or taxpayer received royalty payments, and consequently the payments come within the category of ordinary income and not capital gains.

The transaction here, irrespective of terminology, constitutes, in substance, a lease and not a sale; and, therefore, comes within the provisions for ordinary income and not the sale of capital assets and the capital gains provisions.

Many of the facts have been stipulated, your Honor, and have been reviewed generally by the petitioners' counsel, but there are a few facts which I think the Court may wish to keep in mind in weighing the oral testimony, and which I view as pertinent and a major consideration in determining the question before the Court. [13]

First, the payments are based on the quantity of sand removed, forty cents per cubic yard, and hence are in the nature of royalty payments.

The extension agreement of May 19, 1950, refers to the original agreement of September, 1945, and even designates the payments as royalty payments.

The Honolulu Construction and Draying Company, Ltd., treats them on their books as royalty payments and included them within their manufacturing process as a part of the raw material inventory.

Second, the payments are made monthly and as the sand is withdrawn, as is usual in a lease operation.

Third, a five-year period is involved in the quarrying operations. It was originally contemplated to give the Honolulu Construction and Draying Company an opportunity to use and develop the premises, and as a necessary and major consideration in that use.

Consequently, the case, the respondent says does not come within the purview and import of the capital gains provision, as pointed out by the Supreme Court in *Burnett v. Harmel*.

The capital gains provisions, prior to 1921, if an

asset was sold, irrespective of its character, whether it was a capital asset or not—the profits derived therefrom were taxable as ordinary income. The capital gains [14] provisions were placed in the revenue laws in 1921, because Congress felt there was a hardship resulting from the sale of some of these assets that probably took years to develop, and in which, in a single transaction, in a particular year, created a profit; and as was pointed out in Supreme Court in *Burnett v. Harmel*, these mineral and oil leases take a considerable period of time, in which the use of the premises was a necessary ingredient in the transaction, were not contemplated at all to be covered in the capital gains provisions.

And, lastly, referring to the extension agreement that the petitioners' counsel has mentioned, which was executed on May 19, 1950, the only consideration flowing to Honolulu Construction and Draying Company was the use of the premises for an additional year in time. No additional sand from the original 250,000 cubic yards was contemplated—only to give them additional time for the use of the premises, and consequently points out clearly the fact that this whole transaction leans in the direction and does, in fact, constitute a lease and use of the premises, and consequently comes within this line of cases heretofore referred to.

I think that, your Honor, is a sufficient statement of the pertinent facts and when viewed with the stipulated facts and oral testimony, I believe will

fully support the respondent's contention, and the soundness of his contention. [15]

The Court: Very well, you may call your first witness.

Mr. Padgett: Your Honor, I am going to call Mr. Bush as our first witness; he is slightly out of order, and it is only because he has another engagement.

The Court: Very well.

### LEROY C. BUSH

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Leroy C. Bush.

### Direct Examination

By Mr. Padgett:

Q. What is your occupation?

A. President and general manager of the Honolulu Construction and Draying Company.

Q. What kind of business does the Honolulu Construction and Draying Company run?

A. The company operates a number of businesses; its chief operation is that of rock quarrying, the sale of crushed rock, the production of concrete products, the sale of ready-mixed concrete of every description—concrete products of every description.

Q. Mr. Bush, you are acquainted with the prop-

(Testimony of Leroy C. Bush.)

erty [16] formerly owned by Mr. and Mrs. Gowans, or the property still owned by them?

A. I am.

Q. Are you acquainted with that area generally?

A. Yes.

Q. Now, Mr. Bush, can you tell us a little something about black sand, what it is, what it is like, and what it is used for?

A. This particular type of black sand is a desirable aggregate to be used in the production of lightweight concrete, particularly concrete hollow blocks, which we manufacture and sell, a very desirable so-called lightweight aggregate.

Q. How long has the Honolulu Construction and Draying Company been interested in this particular matter?      A. Since 1935.

Q. Have you ever taken out any other deposits on Makiki Roundtop?      A. I have.

Q. When did you first start upon that?

A. 1935.

Q. Are there other premises up there, besides the Gowan premises—do they contain this particular material?      A. They do.

Q. When did you first begin negotiating with Mr. Gowans for looking towards getting the minerals on their [17] property?

A. We began to get interested in the Gowans' area early in 1944.

Q. When did you first make him an offer, and what was that offer?

(Testimony of Leroy C. Bush.)

A. We approached him and offered to buy a portion of his land in late 1944.

Q. What was his reaction to that?

A. He was very interested in selling.

Q. What did you do after that?

A. We made him an offer, and he proceeded to have the documents drawn up to sell the property to us.

Q. Then what happened?

A. He ran into title difficulties. The title which he had to the property was of such a nature that title could not be transferred to a corporation; so we had to start in all over again.

Q. After you found that out, what was the next step?

A. We were interested in this black sand and not being able to get title, we worked up the idea of putting in—studying the possibility of putting in a suitable subdivision, and excavating and grading and terracing this property in accordance with a subdivision plan or scheme, and we retained a civil engineer, Mr. Towill, to study the feasibility of such a proposition, whereby the property [18] could be terraced and roads put in, subdivided, and as a practical part of that deal, we would remove whatever cinders were in the area, which was the primary things we were interested in.

Q. Were you hoping to do that, yourself, or was Mr. Gowans to do that? When this idea originally came up, was it the idea that Mr. Gowans would make the subdivision, or HC&D would do it?

(Testimony of Leroy C. Bush.)

A. We would make the subdivision, remove the cinders, or the black sand.

Q. Did you talk this over with Mr. Gowans?

A. I did.

Q. What positive steps did you take looking towards setting this thing up?

A. We retained Mr. Towill, and he went to work on a survey, on a contour map.

Q. About when was that?

A. We put Towill to work in April, 1945.

Q. Did you negotiate with anybody else in connection with this scheme?      A. We did not.

Q. Was it necessary to put a road in?

A. Yes, sir.

Q. That was through someone else's property?

A. Through the adjoining area, belonging to— from [19] which we had already removed considerable supply of cinders, and across to the Gowans' area had to be through the Hasegawa area.

Access to the Gowans' area had to be through the Hasegawa area, so we negotiated a deal with them, and the plan was drawn up to subdivide both of the properties and remove the black sand from the Hasegawa area also.

Q. Did you carry on the negotiations with Mr. Hasegawa?

A. I did. Wait a minute. Mrs. Hasegawa had died, and with her son-in-law, Mr. Eguchi and his wife, the daughter of Mrs. Hasegawa.

Q. Do you recall when you finally entered into an agreement with Mr. Gowans?



(Testimony of Leroy C. Bush.)

A. September 4, 1945.

Q. I hand you the original of what—a copy which is attached to the stipulation as Exhibit 5, and ask you if that is the agreement which you entered into with Mr. and Mrs. Gowans?

A. This is the agreement.

Q. Mr. Bush, after you had entered into that agreement, what was the first step taken for carrying it out?

A. We soon found out that Mr. Gowans did not have a clear title to one of the properties, in view of the fact—I believe it is referred to as a home-stead patent—and it [20] was necessary for him to construct a dwelling on that property before he was in position to let us go ahead.

Q. What did you do in order to enable him to get title?

A. We worked out an arrangement with Gowans, so that the Honolulu Construction & Draying Company built the dwelling, advanced the cost in the nature of an advanced payment on whatever black sand we took.

Q. And you subsequently charged that payment off, as you went along?

A. That's right. We worked off the money we had advanced as we withdrew the black sand.

Q. Now, about the time you finished working this house off—about the time you finished working this house off and began to make payments of \$1,050 a month to Mr. Gowans; is that correct?

A. That is correct.

(Testimony of Leroy C. Bush.)

Q. Those were substantially in advance of the amount of black sand that you had removed?

A. That is correct.

Q. Now, what was the reason why Honolulu Construction and Draying Company was willing to make these advances to Mr. Gowans?

A. We had an agreement to buy and remove approximately 250,000 yards of cinders, and it was contemplated that we [21] would remove that at the rate of 50,000 yards a year, and he was expecting payment pretty much on that schedule. However, our use of the black sand turned out to be not quite at the rate that we anticipated, so we made these payments to more or less satisfy that situation.

Q. Was that the understanding at the time you entered into the agreement between yourselves and Mr. Gowans?

A. We had agreed on removing the cinders roughly in five annual equal quantities.

Q. Can you tell us, Mr. Bush, what was the cost of the improvements you placed on the premises, in the form of grading, roads and water mains, and things of that nature?

A. The original estimated cost of these improvements, including water mains, was approximately \$40,000.

Q. And what did it actually work out to be?

A. When we got through, it was close to \$70,000 — I think about \$69,000.

The Court: Did that include the building?

A. No, that did not include the building; that is

(Testimony of Leroy C. Bush.)

just the subdivision, paving, water mains, and so on.

Q. (By Mr. Padgett): How did you handle that expenditure on your books?

A. As we removed this black sand and took it away, we accrued the estimated cost of these improvements, and [22] prorated them on a per yard basis. We started out at fifteen cents a yard, and charged it against the cost of sand removed at that rate, at the beginning.

Q. Mr. Bush, were you able to sell the sand as you removed it?

A. We used it in our own production of concrete hollow blocks.

Q. Did you have use for all of the sand you removed, at the time?

A. It turned out to be that we would take it away lots faster than we could use it.

Q. About how much did you take away, and what did you do with it: did you stockpile it?

A. That's right; we stockpiled it in our concrete products plant out at Kalihi, put it in inventory, and then as it was used in the production of hollow blocks, it was charged out.

Q. About how much did you have stockpiled there at Kalihi?

A. When we got into this last year, we still had something over 100,000 yards to go, so it was necessary for us to acquire land adjoining our operations out there, about three acres, so that we could perform our commitment and take it away, we

(Testimony of Leroy C. Bush.)

stockpiled out there something in excess of 100,000 yards. [23]

Q. You still have some of it on hand?

A. We still have somewhere around 50,000 yards.

Q. Now, at the beginning Mr. Towill made you an estimate, didn't he, of about 250,000 cubic yards?

A. I believe slightly over. It was roughly 250,000.

Q. How much did you actually take out?

A. 250,010 yards.

Q. Was there, on those premises, more usable black sand at that point?

A. Yes. You would have had to change the layout, and it was hardly desirable to do so. We had roughly completed the excavation and terracing in accordance with the plan. If you wanted to take more, you would have to revamp the whole thing, and start over again, and possibly create a less desirable layout.

Q. You had definite plans, then, as to what you were removing, and what the area was?

A. Yes. Mr. Towill made a contour survey of the land in its original shape, and designed a feasible, practical, terraced subdivision, and determined the contour of that ultimate plan, and estimated the quantity in between the two.

Q. In order to set it up under Mr. Towill's plan, was it necessary for you to take out any solid rock?

A. We removed—it varied in quality within [24] the area, and we removed the best quality black sand from where it was, then excavated the less

(Testimony of Leroy C. Bush.)

desirable material—some of it was pretty hard rock—over the area, to bring it to the finished grade.

Q. You used that to fill in?

A. That is right.

Q. At the beginning, Mr. Bush, when you first started to get this sand out, or when you first entered into the deal, did you give the treasurer of your company any instructions as to how to set this up on the books?

A. I did. We discussed with him the contemplated method of operation, and I instructed him that we would remove the stuff and put it in inventory and he was to accrue as inventory cost the forty cents a yard to be paid to Mr. Gowans, the excavating and hauling costs to our concrete products plant, and prorate on a per yard basis the anticipated money we would need at the end of having completed all of this—the cost of putting in the improvements.

Q. Mr. Bush, I notice that the agreement of September 4, 1945, is in terms of buyer and seller.

Was it your intention to purchase 250,000 cubic yards? A. That is correct.

Mr. Chehock: I object to that as calling for a legal conclusion. These facts speak for themselves as to [25] whether this transaction constituted a sale or a lease.

The Court: Well, the Court is aware of the fact that it is necessarily an opinion of this witness. The document speaks for itself. However, I will permit the answer to remain.

(Testimony of Leroy C. Bush.)

Mr. Padgett: Your Honor, since this objection has been made, I would like to get this in. Mr. Chehock has cited some cases. It is my understanding that the Court has never been bound by the terms of any document, but that the question is the intention of the parties. I don't know how to get to the intention of the parties, except ask him the questions, and bring out the facts.

The Court: Very well, I have permitted the witness to answer.

Mr. Padgett: Will you read the last question back, Mr. Reporter?

(Thereupon, the reporter read the pending question.)

Q. (By Mr. Padgett): Mr. Bush, do you recall at what time you employed Mr. Towill?

A. April, 1945.

Q. Did you give him any instructions as to what he should do, at that time?

A. He was to make a contour map, and study whether or not it was feasible to put a subdivision in this area. [26] The area is pretty steep, on the side of a hill, and I instructed him to go into the feasibility of constructing a division within the area.

Q. Mr. Bush, in late 1944, the Commissioner of Public Lands had refused to allow you to purchase this land, and yet, in the agreement of September 4, 1945, there is the alternative that you are to be allowed to purchase this black sand, and the subdivision deal to be entered into.

(Testimony of Leroy C. Bush.)

Now, why was it that that purchase idea was still in the agreement at that late date?

A. We were still hopeful of clearing title, because our primary interest was to purchase the property, likewise Mr. Gowans wanted to sell; we were still hopeful of clearing title, so we could buy the land.

Mr. Padgett: I have no further questions.

### Cross-Examination

By Mr. Chehock:

Q. Mr. Bush, you mentioned that there was some oral understanding, or at least a conversation with Mr. Gowans, to the effect that you would probably extract approximately 50,000 cubic yards a year for a five-year period? A. That is correct.

Q. And was that figure of 50,000 mentioned because you contemplated that was about the amount that you could [27] assimilate and properly use in your manufacturing process?

A. That is correct.

Q. Now, at the end of the five-year period, you had not all of the sand extracted, and so you got this year—this extension period of a year; is that correct? A. Right.

Q. And as that year continued—I mean as the time progressed during that period of a year, you had not used all of the black sand, and so you quarried the property and removed approximately 80,000 cubic yards?

(Testimony of Leroy C. Bush.)

A. I believe that is right; eighty to one hundred thousand.

Q. How long did it take you to extract that eighty thousand to 100,000?

A. I think it was done in the period of about nine months, we had about three months left to get the improvements in.

Q. Nine months to extract the 80,000?

A. Approximately that.

Q. Is that about as fast as you could have extracted it?

A. It was faster than we could. It was a bigger job than we could handle, so we turned the job over to a general contractor to remove it.

Q. How fast would it have been possible for you to [28] have removed 250,000 cubic yards, if you had removed it, not with the thought of assimilating it and using it in your manufacturing processes?

A. The way it turned out, we had been using it at the rate of about 20,000 cubic yards a year.

Q. You could have gone in there and taken it all out and put it in a pile and used it as you wanted it, couldn't you?

A. That is right, but that would have required considerable storage area, and considerable cost.

Q. How long a time would that have taken?

A. If we got enough big equipment in there, we could take it out in six months, I guess.

Q. What you were bargaining for, really, in the way was a time period there of five years, and then an additional year for the use of the premises, and



(Testimony of Leroy C. Bush.)

the development of the property; is that right?

A. The ideal result, as far as our operation was concerned, if we could have taken it from the area and put it right in our plant and not stockpile it at all—that would have been the ideal.

Q. And you needed the use of the premises, so that it would fit in?

A. To save us the cost of acquiring additional land, and rehandling it, and all of the rest. [29]

Q. Mr. Bush, will you describe this property, prior to the time that the sand was extracted?

A. It is a typical cone of volcanic porous ash. There are a number of these flows around here, this is one of them, and just back of it this main Tantalus crater, and when this volcanic activity starts, it is invariably violent, there is gas, and more gas flows up and precipitates into the cone, this porous stuff does, and consequently this material comes out in a liquid mass, and flows down into the lower valley. The cinder cone is a part of the crater, and this is the same material, and it is porous, makes light-weight aggregate for concrete hollow blocks.

Q. Was this property here comparatively flat?

A. No, it was quite steep.

Q. Houses could have been constructed on the sand, could they not?

A. Not economically. The accesses to the area, if you wanted to build a house—the grade is. I would say, thirty to forty per cent, and the construction of roads was quite difficult; economically, it is prohibitive, probably.

(Testimony of Leroy C. Bush.)

Q. It would have required some grading, in order to make it feasible; is that it?

A. I think if you will go out and look at it, that will answer your question. You would almost have to build an elevator to get an automobile down [30] to it.

Q. Will you describe what the property——

A. I will answer your question a little more specifically: If you left the slope, steep as it was, build a road to get to it, and utilize it—that was next to impossible, in my opinion.

Q. Had any houses been built along there without the extraction of the sand?

A. Immediately adjoining the existing highway only.

Q. Then you think it would not be feasible, because of the fact that there would not be access to the highway; is that right?

A. That is right.

Q. Its access to the highway had been obtained from these two property owners that you had bought the sand from, would it have been feasible to have built houses on the ground?

A. No, you would still have to extract the sand, lower the grade down, so you could get at it.

Q. How much?

A. I think the average cut in this area, if I remember correctly, is close to forty feet, and at that, we would up—the grade of the road which we built is ten per cent, which is quite steep, even after we removed that much material.

Q. After the sand was removed, then, and prior

(Testimony of Leroy C. Bush.)

to the time you put any improvements on it, will you describe the property? [31]

A. Well, it was the side of this steep, rounded mountain, with a grade of thirty-five to forty per cent, uniform slope.

Q. (By Mr. Padgett): After the sand is removed?

A. Oh, I beg pardon. Before. I thought the question was before.

Q. (By Mr. Chehock): No; after.

A. Oh, after it was removed, as we say in Hawaii, the Mouka, or upper portion, the adjoining portion to the property which Mr. Gowans retained for his own home—that bank stands up there 100 feet, and in front of it is these terraced lots.

Well, the motions I am making here ought to be on TV, to get it on the record. There are these terraced lots, and each lot is different in elevation about eight or ten feet, and then there is a central access road going right up through the middle of it, so that each lot—the lots on the upper side of the road are higher than those on the lower side, and you can look out over them, and each lot was terraced.

We cut it up into lots of 10,000 to 15,000 square feet and left each lot flat.

Q. How did the property look before you had done [32] any terracing or any improving whatever? Just describe the property after you had extracted the sand.

A. We extracted sand to conform to this terrac-

(Testimony of Leroy C. Bush.)

ing, where we could, except in one area that was generally no good, there was hard rock; we left it that way, and removed some of the black sand from the lower area, the quantity which we wanted, that created, well, quite a hole there, and then we took the hard material and filled the hole up, to bring it up to the planned terrace grade.

Q. How big a hole was dug?

A. That hole was about 40 feet wide, 150 feet long and I think we went down about 70 feet.

Q. And then in order to put the property in shape for residential purposes, did you fill that hole?

A. That's right.

Q. What did you fill it with?

A. With material excavated from the adjoining area, the material that wasn't good black sand; we couldn't use it.

Q. That property couldn't have been used for residential purposes, without filling that hole?

A. No.

Q. Is that quite an operation?

A. Well, the contractor did the whole job, took the 80,000 to 100,000 yards—he did all that for a unit [33] figure.

Q. Do you remember about what it cost?

A. He delivered the black sand, excavated it and delivered it to our concrete products plant for \$1.10 a cubic yard.

The Court: That included the filling up of the hole?

A. That's right.

(Testimony of Leroy C. Bush.)

Q. (By Mr. Chehock): That took about how many cubic yards? A. Out of that hole?

Q. Do you remember what that cost was?

A. He did all of this—he loaded and hauled the material and delivered it to our plant six miles away—he did all that for \$1.10 a cubic yard, including the filling of the hole.

The Court: But you don't know what his total bill was?

A. No, sir.

Q. (By Mr. Chehock): Do you remember approximately? A. Oh, I would say \$90,000.

Q. Well, I don't quite understand, if the total improvements cost \$69,000—how that fits into the \$90,000?

A. That item went into the inventory cost of the [34] black sand, that \$1.10.

Q. Putting the property back and filling in the hole, you consider that as part of the cost of the operation?

A. No, he did that for part of this \$1.10. Then when he got through we went in and finished it up.

Q. You mean you paid him \$1.10?

A. To excavate this material, load it on trucks and deliver it to our stock pile inventory, out at our concrete products plant, and that item went into——

The Court: That was a part of your inventory cost?

A. That is correct.

Q. (By Mr. Chehock): I think you testified there was some more usable sand there.

(Testimony of Leroy C. Bush.)

A. That's right.

Q. Didn't you take most of the usable sand?

A. I would say, economically, we took just about the last yard. There was more there, but it would not lend itself to the proposed development scheme and the cost would have been prohibitive.

Q. Now, the sand that was removed—how did you treat it on your books?

A. The sand that was removed?

Q. Yes. [35]

A. It was stock-piled at our concrete products plant and put in the inventory with all of the costs, including the payment to Gowans, the accrued cost of the improvements which we had to make, and the excavating charges, the trucking charges.

Q. How were they characterized on your books, the payments made to Mr. Gowans? How were the payments made to Gowans characterized?

A. In our records, I believe they were listed as royalties, which is the practice in our operations, in buying rock and sand. That is the procedure that is usually used.

Q. Was there any actual conveyance made to you of the mineral contents of the sand area?

Mr. Padgett: I object.

Q. (By Mr. Chehock): Other than the written agreements of September, 1945, and May, 1950, was there any actual conveyance to you of the mineral contents of the sand bank?

A. Under that agreement, we agreed to buy 250,000 yards of cinders.

(Testimony of Leroy C. Bush.)

Q. You haven't answered my question. Aside from those two written documents, was there any other written agreement or actual conveyance of the mineral contents of the sand area to the Honolulu Construction and Draying Company? [36]

A. That was the basic agreement, and all of the verbiage is in there.

The Court: And that is the only agreement you had?

A. That is the only agreement we had.

Q. (By Mr. Chehock): Did Gowans know there was black sand there before you approached him?

A. Oh, yes.

Q. Did he ever approach you about selling the sand, or extracting it?

A. We were operating all around him, and I think I made the first approach to Mr. Gowans—I am quite sure of that.

Q. Did you already know that Mr. Gowans was interested in selling?

A. I knew he was approached by a competitor.

Q. And did you know that he was interested in having it extracted from his property and making a deal to consummate it?

A. Yes, sir.

Q. You knew that prior to the time that you contacted him?

A. Yes, I was quite sure he was interested in selling the black sand off of his property. [37]

Q. Would you be able to state, in cents per cubic yard, approximately what the cost of extracting—

(Testimony of Leroy C. Bush.)

all of the costs that go to remove the sand from the property—would be?

A. State that again, please.

Q. You paid Gowans forty cents per cubic yard for the sand removed. A. Yes.

Q. Do you know about what it cost you to remove that from the property?

A. All of our costs averaged about—somewhere between \$1.00 and \$1.10. I happen to know that roughly 50,000 cubic yards are still there on the books now at about \$1.70.

Q. If the black sand had been available where you wouldn't have to extract it, yourself, at that time, would you have been willing to have paid approximately \$1.00 or \$1.10 per cubic yard?

A. We were primarily interested in getting the black sand at my plant as cheaply as possible. That was chiefly the determining factor.

Q. I don't think you have answered my question.

A. Would you state the question again, please?

Mr. Chehock: Will you repeat the question, Mr. Reporter? [38]

(Thereupon, the Reporter read the pending question.)

The Witness: The material is in very limited supply and this was the best we could get. In fact, the royalty has skyrocketed since then.

Q. (By Mr. Chehock): Have you ever acquired black sand for your company that is already mined and extracted?



(Testimony of Leroy C. Bush.)

A. We got the black sand from the Hasegawa area through an independent contractor, who had extracted the material, paid the royalty to Hasegawa, and delivered it to us, and in fact it so happens that the beginning cost to us was \$1.10 back in 1935.

Q. That was the sand already extracted?

A. That's right. He paid the royalty and did all of the work, and delivered the product, all wrapped up, to our plant, at \$1.10.

Q. Would you say that was approximately the fair market value of black sand in 1945?

A. No. The price had gone up. That \$1.10 was in 1935.

Q. What would it have been in 1945?

A. In 1945, we sold a small quantity of material for \$2.50 a yard.

Q. What was the cost to you? [39]

A. In 1945, our cost at our plant was about—

Q. I mean the cost—was there any black sand available, in 1945, which you could have bought, without extracting it yourself—just buy it already extracted?      A. We could have.

Q. What was the price at that time?

A. Probably about \$2.50 a yard.

Q. And your figure of the cost of extracting this particular black sand was about how much?

A. The cost of extraction?

Q. Yes.

A. And hauling out to the plant was an average of about \$1.10. That is an offhand figure.

(Testimony of Leroy C. Bush.)

Q. So you saved in this operation, by this deal you made with the Gowans, over this period of time, approximately the difference between \$1.10 and \$2.50?

A. Well, that \$2.50 is a small quantity proposition. It fould be difficult to fix——

Q. Approximately.

A. The availability of material at that time—that the price could be all the way from \$2.00 to \$3.00.

Q. Whatever the difference was between forty cents, plus your cost, which was approximately \$1.10, then the going price of black sand already extracted, you saved by the use of these premises, under this deal, didn't you? [40]

A. I don't know. I would answer your question this way: We could have turned the whole deal over to somebody else and probably gotten the material in this quantity, and under this contract, delivered out to our plant for that cost, plus some profit to the contractor, which might have been 25 cents a yard over our cost.

Q. Then you did have a substantial saving by doing it yourself, under this deal with Gowans?

A. Without question.

Mr. Chechock: I believe that is all.

(Testimony of Leroy C. Bush.)

Redirect Examination

By Mr. Padgett:

Q. This extension that was made in 1950, by the agreement of May 19—can you tell me what the origin or the cause or the reason of that extension was?

A. We still had a considerable quantity of black sand to remove, and we were obligated to remove it, and we were running out of time, that we had not yet arranged a stock pile, so we requested Mr. Gowans to give us an extension of time.

Q. How was it that you had not removed the sand up to that time?

A. We didn't use the quantity we anticipated, due to the fact that another aggregate came into the picture from a color angle, namely, limestone, and starting about that [41] time and since then about one-half of our production has been of this other material, limestone, that reduced the anticipated use of the black sand.

Q. Were you delayed, at all, in starting operations on the premises?

A. Just in connection with his clearing title to the land.

Q. Could you tell me about how long that delay was?

A. The record will show that. I think it was about nine months.

Q. About nine months?

A. Yes, sir.

(Testimony of Leroy C. Bush.)

Q. Now, Mr. Bush, you were asked some questions about how fast all of that sand might have been taken out. Isn't it a fact that the rate at which you take out sand depends upon the amount of equipment you put into the job?

A. That is correct.

Q. If you had gone up there with enough equipment to remove the 250,000 cubic yards in six or nine months and put that subdivision in in that time, would such operation have been economically feasible?

A. Well, the removal and hauling away and the cost of installing the subdivision, I would say would not have been affected. However, our stock-pile cost would have been substantial for the additional sand, and rehandling. [42]

Q. Would you have run into the cost for the additional equipment, in order to remove the black sand in that short period?

A. No; I would say that the actual cost would not have been affected by the shortness of the time.

Q. You would have had to get more land to pile it up?

A. Yes, sir; rehandle it and land rental, and what not, connected with the inventory, which would have been substantially increased.

Q. You have been asked questions about the quantity of black sand available—or about the price of black sand available on the open market in 1945. Was that in any quantity?

A. I had in mind the smaller quantities.

(Testimony of Leroy C. Bush.)

Q. Could you have obtained enough black sand on the open market to have met your needs?

A. No.

Mr. Padget: That is all.

Recross-Examination

By Mr. Chehock:

Q. Mr. Bush, black sand was very much in demand in 1945, wasn't it? A. Yes, sir.

Q. And it was really very desirable ingredient for your manufacturing processes? [43]

A. Correct.

Q. If Mr. Gowans had said to you, or to your company, "You may have the black sand on my property of approximately 250,000 cubic yards, providing that you will see that it is taken off in six months," would you have made the deal with him?

A. No, at that time, I think we could have made a more favorable deal for the adjoining area, probably less quantity, but I would say we could have made a more favorable deal, and that would have kept us going for quite a while.

Mr. Gowans drove a very good bargain.

Q. How could a deal have been made on the adjoining property?

A. There was additional sand available there, there was and still is, in diminishing supply, and the royalty is going up.

Q. But it would have been possible, if you had wanted the sand, to have extracted it?

(Testimony of Leroy C. Bush.)

A. At that time, yes.

Q. If it hadn't been extracted, you would have made some deal possibly with some other folks—if it hadn't been for the fact that you could have made a deal with some other folks, possibly, you would have agreed to take the 250,000 yards in six months, wouldn't you?

A. If it had not been possible? [44]

Q. Yes.

A. I am afraid we would have had to.

Mr. Chehock: That is all.

Mr. Padgett: That is all, Mr. Bush.

The Court: Very well, you may step aside.

(Witness excused.)

The Court: How many witnesses do you have?

Mr. Padgett: I have three more witnesses, your Honor.

The Court: How much time do you think you will need to finish the case?

Mr. Padgett: I imagine three witnesses—this examination has been much more than I thought, but I think we would take about an hour.

The Court: Very well, we will recess for five minutes.

(Thereupon, a brief recess was taken.)

The Court: You may call your next witness.

Mr. Padgett: Mr. Towill.

R. M. TOWILL

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name, sir?

The Witness: R. M. Towill. [45]

Direct Examination

By Mr. Padgett:

Q. What is your occupation?

A. Civil engineer and surveyor.

Q. How long have you been engaged in that line of endeavor?           A. Since 1930.

Q. And in the Territory of Hawaii?

A. Since 1923.

Q. Mr. Towill, are you acquainted with the property owned by Mr. and Mrs. Gowans on Makiki Roundtop, Lots 622 and 624?           A. I am.

Q. Have you done any work in connection with those lots?           A. I have.

Q. How much, and by whom were you first engaged to work on it?

A. I was employed by Mr. Leroy Bush for the Honolulu Construction and Draying Company.

Q. And you can tell us when that was? Have you any records to show that?

A. On April 2 and 3, 1945.

Q. When you were employed by Mr. Bush, what were Mr. Bush's instructions as to what you were to do? [46]

A. To prepare a contour map, or to compute the

(Testimony of R. M. Towill.)

volume of material in that area, and also to see if it would be feasible to have there a subdivision, or to make a subdivision.

Q. What was the first thing you did in connection therewith?

A. Prepare contour map, as well as take levels—go out and take levels and prepare a contour map.

Q. And when was that?

A. The work was started on April 4, 1945.

Q. You said you were employed to make an estimate of the available minerals, black sand; is that correct?

A. That is correct.

Q. When did you make that estimate?

A. I believe it was in June—the latter part of May, or the beginning of June, 1945, after the completion of this contour survey.

Q. And do you recall or do you have anything to show what your estimate of the available black sand in the area in question, the Gowans property, was?

A. My computation shows in the neighborhood of 253,000 yards, which I reported around 250,000 yards to Mr. Bush, from the preliminary estimate and preliminary studies of the grades for a subdivision.

Q. Now, after you made this estimate, what next did [47] you do, in connection with this property?

A. I prepared a subdivision plan.

Q. Can you tell us about when that was?

A. The subdivision plan is dated September 19,



(Testimony of R. M. Towill.)

1945. It was submitted to the Planning Commission at that time, for their approval.

Q. Do you have a copy of the plan which you submitted, and the letter which you submitted, to the Planning Commission, at that time, with you?

A. No; I have a copy of it, I have a copy of the original tracing, from which the prints were made, which were submitted to the Planning Commission.

Q. It is the tracing which you are holding here?

A. That is correct.

Q. And what does that purport to show?

A. The proposed subdivision, portions of lots 822, 823 and 824, Makiki Roundtop lots.

Q. Does it have thereon the contour lines as they then existed?      A. It has.

Mr. Padgett: Your Honor, I will offer this map in evidence at this time.

The Court: Is there any objection?

Mr. Chehock: No objection.

The Court: There being no objection, [48] petitioners' Exhibit No. 16 is received in evidence.

(The map referred to was marked Petitioners' Exhibit No. 16 and received in evidence.)

Mr. Chehock: I have no objection to its admission, your Honor, but I do think counsel should furnish us a copy of it or a photostat of it.

The Court: I was going to inquire whether or not you wanted to withdraw this original and substitute a photostatic copy for it, Mr. Padgett?

(Testimony of R. M. Towill.)

The Witness: Your Honor, please, white prints could be made from that in a very short while.

Mr. Padgett: We will do that, your Honor.

The Court: If you do desire to do that and supply counsel for the respondent with a photostatic copy, leave will be given to withdraw the original and substitute a photostatic copy therefor.

Mr. Padgett: Very well. Thank you, your Honor.

Q. (By Mr. Padgett): Do you know the date upon which you submitted the preliminary plans to the City Planning Commission for preliminary approval?

A. It was some time in September, I think the 19th.

Q. Did you receive approval from the City Planning Commission? [49]

A. Yes, I did, preliminary approval from them.

Q. About when was that?

A. That was at the meeting that was held in the middle of September, about the middle of September.

Q. Now, then, after that, did you continue to work in connection with this proposed subdivision, from time to time?      A. I did.

Q. How long did that—I mean, when did you do this work, over what period of time?

A. The work was completed in September of 1952. That was my final bill to the Honolulu Construction and Draying Company for services in connection with that project.

Q. Mr. Towill, would it have been feasible to

(Testimony of R. M. Towill.)

subdivide that property, or build houses thereon, without removing the black sand?

A. It would not have, no.

Q. Why is that?

A. Because the property was so precipitous; it had to be lowered in elevation, in order to provide an access road, or a passable road to get into the property.

Q. A passable road to get into the property—who required that?      A. How is that?

Q. Who required that there be a passable road to get [50] into the property?

A. That is the rule and regulation of the Planning Commission and the county or the city.

Q. Could you tell us about what the grade was originally on that particular area?

A. I would like to refer to that map. It was about twenty feet in every forty feet; a slope of about one and one-half to one, which is rather precipitous.

Mr. Padgett: I have no further questions of the witness.

### Cross-Examination

By Mr. Chehock:

Q. Your name is Mr. Towill?

A. That is correct.

Q. Did Mr. Gowans or Mr. Bush approach you on doing this work of surveying and making the subdivision map?

(Testimony of R. M. Towill.)

A. Mr. Bush, for the account of the Honolulu Construction and Draying Company.

Q. Did Mr. Gowans also see you about it?

A. I don't recall that he did, until near the completion of the project.

Q. Will you just describe the property out there in September, 1945, when you made this contour map? Describe it so that we can get a clear picture of what the property looked like in September of 1945. This is prior to any [51] excavation.

A. May I use this map to illustrate that?

Q. Yes. Remember that when you point to something, that won't go into the record, because it will have to be by word of mouth, and you will have to describe it.

A. I realize that.

The Court: Maybe you can hold it back against the wall, so everybody can see it. Is it visible to you people out there?

The Witness: The Makiki Roundtop road, going up the mountain, in the southerly or southwestern section of the property. The balance of the property comprises an area almost L-shaped.

Q. (By Mr. Chehock): Wait a minute. You mean towards the upper portion of the map there, do you?

A. Yes, sir, the upper and northerly part of the property. To the south and west of Mr. Gowans' property there was some property owned by the Hasegawas through which it was necessary to pass, in order to quarry the sand from the Gowans' property.

(Testimony of R. M. Towill.)

Q. Did you say in order to quarry it from there? Did you say it was necessary to pass over this other property in order to quarry the sand; is that what you said?

A. That is correct. The Hasegawa property, and the [52] parcel adjacent to the west of the Gowans' property had been quarried for a period of years in small quantities, and in order to get into the Gowans' property, Mr. Bush negotiated with the Hasegawas for an easement to get into the premises. I don't recall the details, but I know that in the agreement, he agreed, at the completion of the quarrying, to construct a road for the Hasegawas.

In order to subdivide this property, it was first necessary to set a grade along this access road that would not be too steep, in order to gain entrance, and it was also necessary to take out a great volume of sand here, in order to lower the elevation of that property, so that you could get a road into it.

Q. Right there, about how much sand would have to be removed, in order to do that?

A. There was 250,000 yards that was the minimum that they could take out to get grades in there, and their land was so precipitous, originally, that we had to come in there with a horseshoe turn, in order to gain grade, to get into the property.

Q. Are you through? A. Yes, sir.

Q. Well, now, you have explained somewhat, probably, but can you explain in a more general way the description of the property—not as to what

(Testimony of R. M. Towill.)

had to be done, but just a [53] general description of the property?

A. You mean as to the location or the physical character?

Q. Well, as to the physical character.

A. The property is a portion of that Makiki Roundtop ridge that comes down. Along the southerly and westerly side of the ridge, this Tantalus Road, called the Makiki Roundtop Road to Tantalus, goes along the side, from that road it was sloping in this direction (indicating), along the hillside, and up at the same time. It was a hillside covered with what is known as Haleko, which is a kind of shrubbery.

Mr. Chehock: Do you have any questions, your Honor, that you want to ask him?

The Court: I want to get a picture of the lots that are involved, and I think it is fairly clear here now. This blue-marked part down at—is that the south side?

The Witness: Yes.

The Court: And the south side—that is on the property belonging to the Hasegawas?

A. That is correct.

Q. Then when you get over to about this line, what is that line—a pipeline?

A. That is a right of way that went through there for a [54] pipeline, and I believe the electric line also.

Q. When you get to that pipeline, you then get onto the Gowans' property; is that correct?

(Testimony of R. M. Towill.)

A. Yes, sir.

Q. From there on, the rest of this is all—this whole blue-marked part, of course, is all on the Gowans' property?

A. That is correct, and the Gowans' property, your Honor, is covered right here (indicating).

Q. Where is Lot 824? One of those lots is 822 and one is 824. Will you more or less designate those on here for me?

Mr. Padgett: This one here (indicating), your Honor, on the left-hand side of the map is 824, and the one on the right is 822, as I recall.

The Court: And these are subdivision lots?

A. Yes, they are lots.

Q. If you could more or less blue pencil, some way or another way, and then right up to the top or on the bottom, show the lot numbers—will that show on a photostatic copy?

A. It will not, your Honor.

Do you want a photostat or shall I make you a white copy? I can transfer the same coloring to that print that [55] we have here.

The Court: That will be fine. If you will mark these lots in red pencil, that will give me a better idea of the land we are concerned with.

The Witness: Yes, sir.

The Court: The dividing line between Lots 824 and 822 is where?

A. Right here (indicating).

The Court: That is all I have.

Q. (By Mr. Chehock): Mr. Towill, this Exhibit

(Testimony of R. M. Towill.)

16 is merely a proposed subdivision; it would not have been in existence in September, 1945?

A. No, sir.

Q. Did you go out and look the property over in September, 1945?

A. Yes, I did. I took field crews there and made surveys.

Q. Did this sand extend over this property that is marked off in red here, that was ultimately subdivided—did the sand extend over that entire property?

A. It did, that whole area in there was black sand.

Q. And after the Honolulu Construction and Draying Company had extracted the sand from this property, will you describe it, prior to any terracing or any improvements, but [56] after the sand had been extracted; will you describe the property?

A. During the extraction of the sand, I was employed by the Honolulu Construction and Draying Company to give the levels at times, in order that they would extract sand to eventually come to the grade prepared for the subdivision; so that when they finally completed their extraction of sand, the land was in shape for lots and roads.

Q. Now, Mr. Towill, isn't it true, as Mr. Bush has testified, that when he got through there was a great big hole there that had to be filled?

A. That was in the preliminary stages, over in the southerly corner here (indicating).

Q. Will you describe that hole?



(Testimony of R. M. Towill.)

A. I don't know that I was on the premises while that hole was there—personally on the premises.

Q. And the extraction of this sand, necessarily would mean that a large hole would be created on the property, that would have to be filled, in order to complete the subdivision as contemplated under Exhibit 16; is that correct?

A. Not necessarily, sir.

Q. You heard Mr. Bush testify that they did have this big hole, that was about 70 feet, didn't you?      A. I didn't hear that.

Q. You weren't out on the property after this sand was [57] extracted?

A. I was there at various times, yes, sir, maybe once a month, sometimes every three months, directing field crews and surveying.

Q. You seemed to know about this big hole. Now, what do you know about it?

A. All I know is hearsay.

The Court: You don't recall having ever seen it?

A. No, your Honor.

Q. Only what Mr. Bush told you, or someone else, is all you know?      A. Yes, sir.

Q. (By Mr. Chehock): Were you out there to see that the improvements were made, or did you have anything to do with that?

A. What improvements are you speaking of?

Q. The terracing of the property, the filling in of the hole, leveling it off, and putting on whatever

(Testimony of R. M. Towill.)

was necessary for a complete subdivision as shown in Exhibit 16?

A. These are not the plans that were finally approved by the various departments of the city for the completion of the utilities which were required for this subdivision; that is a set of engineering plans, this is the preliminary plan not the final [58] plans.

Q. When were the final plans drawn up—in 1952?

A. In April of 1952, prior to April of 1952, yes, sir.

Q. Will you describe how they compared to Exhibit 16?

A. Essentially, it is the same. The lots are approximately of the same sizes. The road location is the same as shown on the preliminary plans. The engineering plans show the final details of catch basins, water mains, grades of the road, and curbs and gutters.

The Court: Did you prepare the final plans or were they prepared by the Commission?

A. No, your Honor, I prepared plans which were the routine. The engineers prepared the plans and submitted them to the city, the various departments of the city for their approval and check.

Q. (By Mr. Chehock): How did you determine that there was 250,000 cubic yards of black sand that you estimated on the property?

A. By studying the grades in the subdivision and computing the difference of where the subdi-

(Testimony of R. M. Towill.)

vision would be and the original ground at that time.

Q. How much—do you know how much sand, roughly, was located on the southerly portion of these two lots, 824 and 822?

A. I have no breakdown of that. I treated it as a [59] whole, sir, the whole area.

Q. Well, now, is the ridge or the mountain on the north side of the map, the top side of the map?

A. Going up the hill is towards the north and to the east. This was the side hill here (indicating).

Q. Will you describe where the mountain is, or the ridge is, in relation to Exhibit 16?

A. I would say that the property is on the southwest slope of Makiki Roundtop Ridge.

Q. Now, referring to Exhibit 16, is the ridge the upper part, the left or the right or the lower part of Exhibit 16?

A. The ridge is on the north.

Q. Which is the right side of the map?

A. The top of the map.

Q. The top of the map?

A. The top of the map is approximately north, and the right-hand side of the map can be called the easterly side of the property, or the southeasterly side of the property, and this ridge extends on up to the top of Mt. Tantalus in a northeasterly direction.

Q. Was the sand deposit greater, in depth, as you go up the incline?

A. Yes; as you went towards the upper end of

(Testimony of R. M. Towill.)

the property, there was a greater volume of sand, per square foot, [60] than there was on the lower edge of the property.

Q. On the lower edge of the property, about how much sand was there, per square foot?

A. I would have to compute that.

Q. Well, was it substantial?

A. To give you an illustration, the lower end of the property, the elevation was approximately 450 feet. At the top of the property, the northerly end of it, the elevation was 600 feet. In other words, there was 150 feet difference in elevation from the bottom of the property to the top of the property.

Now, the roads were laid out so that they would gradually go up, but when the complete excavation was done, I think at the top of the property there was a cut of somewhere in the neighborhood of 70 feet, and at the lower end of the property there was a cut probably of 12 to 20 feet. I would have to refer to the engineering drawings to give you those figures exactly, sir.

Q. After the excavation was done and the terracing, and the property subdivided, there was still an incline, was there not, from the southern part to the northern part of the property?

A. That is correct, yes.

Q. And about what was that incline?

A. I would say in the neighborhood of probably 20 feet, [61] I estimate. I can give you the exact figure by referring to my engineering drawings, sir.

Mr. Chehock: That is all.

(Testimony of R. M. Towill.)

The Court: Very well, you may be excused.

Mr. Padgett: Your Honor, I would like to ask one or two more questions.

**Redirect Examination**

By Mr. Padgett:

Q. You asked about a road across the Hasegawa property, whether it was necessary for the purpose of quarrying. Was that road also necessary for the purpose of subdivision? A. Yes, sir.

Q. How wide a road did you have to put in, under the requirements of the City Planning Commission? A. A width of 32 feet.

Q. Was there any other way to get a 30-foot, or a 32-foot road in there, except by crossing the Hasegawa property? A. No, sir.

Mr. Padgett: That is all.

Mr. Chehock: That is all.

The Court: Very well. You may stand aside, sir.

(Witness excused.)

The Court: I understand that that is to be withdrawn and a copy to be furnished, mark it—— [62]

Mr. Padgett: Marked with the same color, your Honor.

The Court: And you will supply respondent's counsel with the copy?

Mr. Padgett: Yes, I will, your Honor.

Mr. Gowans, please.

## LOUIS L. GOWANS

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please, sir?

The Witness: Louis L. Gowans.

## Direct Examination

By Mr. Padgett:

Q. What is your occupation, Mr. Gowans?

A. I am Executive Engineer of the Honolulu Gas Company.

Q. Did you own some property on Makiki Roundtop, in Honolulu? A. Yes, sir.

Q. What was the first piece of that property which you acquired, and when?

A. Well, the first piece we acquired up there was on—was under an agreement of sale, Lot 824. I think that was the number, approximately three acres.

Q. Did you subsequently get title to it? [63]

A. We subsequently got title to that.

Q. Is that the property on which your home is located?

A. That is the property on which our home is located.

Q. The other piece—is that lot 822?

A. 822.

Q. Will you tell us about your negotiations with

(Testimony of Louis L. Gowans.)

the Honolulu Construction and Draying Company, with relation to that property?

A. Yes. Knowing the property surrounding that, when they had removed this black sand, I was aware that these two lots contained black sand, and I had known Mr. Bush for a long time, and I had kidded with him about—"When are you going to buy my lot," for a good many years that we held this land, and he would say, "Well, we are not ready for that yet. Some day, maybe we will make you an offer," that was as near negotiations as we ever got; but in 1944, he approached me with the idea of buying the lower portion of the lot.

Q. Both or one?

A. Both lots, they were not usable, not being used, and in the condition they were in, they were useless, for any purpose that I could see; but I didn't think the value was going up any more, and I felt that it was useless to hold them any longer, if somebody would buy them; and since they used black sand, there was a quantity of black sand [64] on the land, I thought that probably they would be the logical purchasers, and their offer, or my desire to sell, was consummated in a contract.

Mr. Chehock: Now, your Honor, the witness is using the word "sale," here and I don't like to make an objection on the ground that it is a conclusion, but I take it that the testimony may be his method of describing the situation that way, but I don't want to be understood, by not objecting, that I admit that there was a sale.

(Testimony of Louis L. Gowans.)

The Court: The Court is aware of that, and we will bear that in mind. I assume you can cover the matter on your cross-examination.

Mr. Chelock: Yes.

Q. (By Mr. Padgett): What was the original proposition in 1944, Mr. Gowans?

A. The original proposition was to divide the two lots into two portions. One portion that was adjacent to the highway, that could be used, and another portion that was of no use to me, but which did contain sand, and H. C. and D. agreed that they would buy it at 40 cents a square foot, the exact area to be determined by a survey.

Q. What steps did you take towards carrying out—towards accepting that proposition?

A. Well, at that time, I did not have title to Lot 822; [65] I was buying it under an agreement with the Territory, and in order to make a sale, I went to the Land Commissioner, and asked him if we could sell this land to H. C. and D. by meeting the requirements of building a house and paying the balance due on the land. We had gotten to the stage where we were going to make the sale, and then the attorney told us the limits on the use of this land were stipulated by the Land Department, the Land Commissioner, that it would be necessary to get his permission before we could make the sale. This permission was denied——

Q. That was handled by——

A. ——and the sale was not made.

Q. You wrote the Land Commissioner?



(Testimony of Louis L. Gowans.)

A. That's right.

Q. And you got a reply?

A. I got a reply that was not favorable.

Q. Then what was the next thing that you did after that?

A. Well, the next thing, Mr. Bush came to me with the idea that possibly by working out a subdivision on this land—a subdivision for this land, and a quarrying and access road into it, we might be able to—in the process of creating a subdivision, be able to remove some sand off of the lot, not the total quantity, but some sand, and still leave the land usable for house lots, which seemed to be [66] the Land Department's desire.

The Court: Did 824 have the same restrictions on sale as 822 had?

A. I don't know. My deed did not mention the restrictions, but the deed to the Geers, who acquired it from the Government, may have required that, I am not certain, but it definitely was in the patent for 822.

Q. Do you still own both of those lots?

A. No, I do not. I own a portion of them.

Q. It has been subdivided and you have sold off lots?

A. Well, I sold the whole thing at one sale.

Q. (By Mr. Padgett): And that is the lower portion——

A. The lower portion of these two lots.

Q. Did Mr. Bush make you a proposition, at

(Testimony of Louis L. Gowans.)

that time, with respect to doing this thing by virtue of removing the sand and making a subdivision?

A. The agreement we entered into provided merely that he would buy this land, if it were possible. I think that he still felt that, if it were worked out as a subdivision, and the land eventually used for house lots, that the Land Commissioner would not object to H. C. and D. owning it during the transition period from removing the land and preparing it for subdivision and eventually putting it on [67] the market for house lots; and so the agreement we first entered into was that first we would sell the property to H. C. and D., if Mr. Bush could clear that matter; if not, we would sell the sand to Mr. Bush, take the property and sell it.

Mr. Chehock: I didn't get the last part.

The Witness: It amounted to a 2-part sale, the land and the sand. If Mr. Bush could not buy the whole thing, the sand developed in the creating of the subdivision would be sold to Mr. Bush, and then I could sell the land any way I saw fit.

The Court: That is what was done?

A. That is what was done.

Q. (By Mr. Padgett): Now, when you originally——

Mr. Chehock: Now, your Honor, I would object to the conclusion that that was what was done. What was done was a legal transaction entered into.

The Court: Well, whatever it is, they followed the second section of the contract, whether it is a lease or a sale, or whatever it might be, that is

(Testimony of Louis L. Gowans.)

what they did. They didn't convey the title to the land.

The Court: You retained the title to the [68] land?

A. That is correct.

Q. (By Mr. Padgett): Handing you this agreement of September 4, 1945, which is Exhibit 5 attached to the stipulation, is that the agreement which you entered into with the Honolulu Construction and Draying Company?

Mr. Chehock: Your Honor, that instrument has been stipulated.

Mr. Padgett: Yes, I know, but I just wanted to identify it.

The Witness: Yes, that is correct.

Q. (By Mr. Padgett): Now, Mr. Gowans, I call your attention to the fact that there is one alternative—I mean, that there is in the alternative, the removal of the sand and the subdivision proposal, there is a five-year limitation on that. Can you tell me whose idea that was?

A. Well, I was anxious to get my money, and would have liked the term as short as possible. Mr. Bush was faced with the problem of how fast he could use it, and how much equipment he had available to make his operation as economically as possible, and we arrived at the five-year period as being—and the price he was to pay, as possibly a good a solution for both of us as we could arrive at.

Q. Mr. Gowans, after the agreement was en-

(Testimony of Louis L. Gowans.)

tered into, [69] what was the next thing that was done in connection with this transaction?

A. Well, after the agreement was signed, Mr. Bush was allowed to start on the work of removal of the sand until the title for Lot 822 was cleared, and in order to clear that, we had to build a house.

That was right after the war, the materials were very hard to get, but Mr. Bush, being in the construction business, thought that he could get the materials and build this house and satisfy the terms of the agreement with the Government; and he had the plans drawn up, which I approved, and he did build the house, the title was cleared, and I received a land patent from the Government for Lot 822.

Q. And it was after that, that they started removing the sand?

A. It was after that that they actually started.

Q. This house was built on an area of Lot 822, not within the sand area?

A. That is correct.

Q. I take it that Honolulu Construction and Draying Company built this house at their own expense, and charged back to you their expense as they removed the sand?

A. That is correct.

Q. Now, with respect to the modified agreement of May 19, 1950, can you tell us how it came about that that [70] modification was entered into?

A. Well, Mr. Bush was not taking off the quantity that he originally thought he would remove during each of the five years, and it looked as though he was going to have difficulty in meeting

(Testimony of Louis L. Gowans.)

the final day, and he suggested that we extend the time. He was willing to make the payments required in five years, but wanted more time to actually complete the work; so there was an additional extension of time for the completion of the work.

Q. I note that that agreement which is an exhibit attached to the stipulation, the payments were set at \$2,040 a month, and H. C. and D. was obligated to pay that amount of \$2,040 a month; is that correct?

A. Yes. I had made certain commitments based on this contract with H. C. and D., and the extension of time and the payments made it necessary to me to make some other arrangement about this money, and so H. C. and D. agreed to make the payments to me of \$2,040, I think it was, which I was obligated to make to the bank, whether they took the sand out or not.

Q. As a matter of fact, when you originally entered into this agreement with Mr. Bush, did you have any understanding as to how much sand he was going to remove a year?

A. Well, we agreed between us that he would do about one-fifth of the work each year, so the payments would be [71] spread over a five-year period, and he could do the work any way he saw fit.

Q. Along about 1947, did you enter into a note with the bank, by which you obligated yourself to pay \$1,050 a month to the bank?

A. That is correct.

(Testimony of Louis L. Gowans.)

Mr. Padgett: That note is attached as an exhibit to the stipulation, your Honor.

Q. (By Mr. Padgett): Now, isn't it a fact that H. C. and D., in March of 1948, commenced to pay you that sum of \$1,050 a month, which you turned over to the bank? A. That is correct.

Q. And that situation went on until the new agreement was made in March of 1950?

A. Yes, when the extension was agreed to.

Q. And during that period, while they were paying you \$1,050 per month, that was substantially in advance of the amount of black sand that they had withdrawn?

A. I never knew how much black sand they had withdrawn, except that I accepted their reports; I had no check. The only thing I was interested in was that they would remove the 250,000 yards by the end of five years. I was dependent upon the engineer's drawings to determine that quantity. [72]

Q. Mr. Gowans, Exhibit 5, which I have shown you, is in the language of buyer and seller. Was it your conception that you had sold 250,000 cubic yards of black sand?

A. Absolutely. I felt that I had no control over that 250,000 yards after that contract was entered into.

Q. Ultimately, after the sand was removed, you sold the whole subdivision area to someone?

A. That is correct.

Mr. Padgett: That is all, your Honor.

(Testimony of Louis L. Gowans.)

Cross-Examination

By Mr. Chehock:

Q. Mr. Gowans, the reason the payments were made to the bank, these royalty payments—were they made to you and then to the bank, or paid directly to the bank?

A. I am not certain of that. They may have been made to me directly and I paid them to the bank; I am not sure, but I did sign the contract that guaranteed the payments to the bank.

Q. The only reason the bank was involved was because of your dealings in borrowing money from the bank? A. Yes.

Q. Otherwise, the bank would not have been in the picture, at all, would it?

A. No; that is correct. [73]

Q. In other words, in regard to this extension agreement that was entered into in May of 1950, H. C. and D. got no additional sand; I mean, even after that additional year was up, they were only to get the 250,000 cubic yards originally contemplated? A. That is right.

Q. So that the only purpose of the extension agreement was to give them the additional year and the use of the premises in extracting the sand; is that correct?

A. They felt it would be a hardship to have to take it out in five years, and their operations would be more economical if they could extend it a year.

(Testimony of Louis L. Gowans.)

Q. Mr. Gowans, I don't know if you can add anything, or not, but if you can, describe the property in September of 1945, before any excavations were had, at all, that will be helpful to the Court, I wish you would do it.

The Court: The physical aspects of the property.

The Witness: The land, itself, is located on the face of Roundtop Mountain, the mountain southeast of here, and it is fairly uniform slope from the top of the hill to what is called the plains down here at Makiki. The grades, I would think, were about thirty or thirty-five degrees or the slope of that mountain can be determined, if it is very [74] important.

Q. You are describing it now as of September, 1945?

A. That is correct. That is a fairly uniform slope, on a hillside, with a road along the top side of the two lots. That is the only place that the road touches the land, or touched the land at that time.

Q. It would have been possible, would it not, to have built houses on your property, as it was?

A. Well, I had already built a house on the property, where we had access to the road. Which property are you speaking of?

Q. I mean, this Lot 824 and Lot 822, where the black sand was eventually taken out of. If the sand had been left there, could the houses have been built on it?

A. Physically or legally?

Q. Well—strike it.



(Testimony of Louis L. Gowans.)

The Court: It would have been physically possible?

A. Physically, it would have been possible, at great expense, to build them there, but you couldn't have met the city's subdivision requirements to have sold the lots, without access from the road.

You have to have water, lights, sewers or cess-pools, and sidewalks and roads before you could sell off lots.

Q. In order to—and this project, you did get an easement through a couple of people's property; is that right? [75]

A. We got a thirty-foot—actually, it was deeded to us, eventually, thirty feet, across the Hasegawa property.

Q. That could have been obtained whether the black sand had been removed, or not, could it not?

A. Well, I don't know. It depends on what Hasegawa would have been willing to do.

Q. Well, assuming that they wouldn't have been any worse off—would they?

A. Well, they would have lost the road. It would have split their property.

Q. Well, eventually, they gave it up anyway, didn't they?

A. Yes, they gave it up for a consideration.

Q. If you had given them back the consideration, the same consideration, you could have erected houses on the black sand, without excavating and taking it out of the property, couldn't you?

A. Are you talking about physically?

(Testimony of Louis L. Gowans.)

Q. I am talking about physically or legally. If you had the right of access to the road there, you could have built houses on it legally, as well as physically, couldn't you?

A. Not without taking a road into the property.

Q. I mean taking the road into the property?

A. It would have taken a great deal of [76] grading. Something would have had to be done with the black sand. Even the roads going up the hillside there, why they have got plenty of distance, you can see where they have cut the mountain out to make the road, and they simply had to get rid of the material to get a road into the side of the hill.

Q. Well, now this black sand was all over your property, where they took it off, wasn't it?

A. Well, it was in varying thicknesses.

Q. Varying depths?           A. Yes.

Q. And, of course, you knew that if they took the black sand off of your land it would be just an eyesore there and would naturally necessitate terracing it, and fixing it up for residential purposes, did you not?

A. I don't know that I quite understand your question about the eyesore.

Q. Well, describe the property after the sand was excavated and before it was filled in.

A. Well, they had a great deal of heavy equipment in there, moving the sand around, they dug a pit there, where the trucks could drive down in, and the bulldozers worked and removed the sand

(Testimony of Louis L. Gowans.)

and moved it into hoppers where they could load automatically into these trucks to remove it. That was all a part of the operation. Getting these 250,000 [77] yards off—you can't move that quantity of material economically without cutting and grading, and setting up equipment, or moving sand economically—bulldozers and hoppers and pits to drive into, so the trucks could load. That was all a part of the operation.

Q. Just describe the property after the sand was taken out, and before it was filled in. How deep was it, and how much did they have to fill in, and what the size of the hole, and so forth?

A. Well, they discovered a sand that they felt was desirable and they excavated a pit on a portion of the lot where the sand was desirable, and built a road down to that, and from that point they pushed the sand from the balance of the land up to this hole to load their trucks. After they had completed that, they went back into the corner of the land, where the material was hard, and they cut down that to the engineering plan, as Mr. Towill developed, and filled up this hole that they had used for loading the material that they felt was desirable.

Q. Will you describe the size of that hole, before they filled it in?

A. I would think it was probably 50 feet wide, and 60 or 70 feet long, where trucks could drive down in and turn around onto the hopper, and drive out again.

(Testimony of Louis L. Gowans.)

Q. How deep was it? [78]

A. Well, measured from what?

Q. I beg your pardon?

A. Measured from what?

Q. Up to where it would eventually have to be filled in.

A. How much lower was it than the eventual grade?

Q. Yes.

A. I would think about 20 feet, possibly.

Q. And so after they had excavated the sand and had this big hole there, they did whatever was necessary to fill in this hole? A. Yes.

Q. And what else did they do?

A. They finished the final grading and put in the improvements, the roads, the water mains, street lights, and so on.

The Court: Whatever was required for the subdivision?

A. They agreed to do the minimum requirements to meet the subdivision laws of the city and county. That was their agreement. They submitted these plans and got approval and H. C. and D. did put in the improvements, did meet the subdivision requirements and got the approval of the city. [79]

Q. (By Mr. Chehock): In making your original deal, you knew that it cost more to excavate and quarry all of these 250,000 cubic yards of black sand on your property, it would probably mean the digging of a hole there, and so forth. You contemplated then, from the beginning, that the property

(Testimony of Louis L. Gowans.)

would need to be put back, and the hole filled up, and so forth, in order to put it in ultimate shape for a subdivision, that was what you contemplated from the beginning, that they would use the premises and you knew that, and that is the reason you made a part of the deal the fact that they would put the property back into position where you didn't have a hole, and where they could improve it and terrace it, and put on the subdivision?

Mr. Padgett: Your Honor, I am going to object to that question. I got lost about halfway through.

The Court: Yes, your question is a little bit involved, Mr. Chehock. However, if the witness followed the question, I will permit him to answer.

The Witness: I don't know that I fully understand it but certainly the improvements for the subdivision was a part of the price that H. C. and D. agreed to pay for the 250,000 yards of sand that they bought.

Q. (By Mr. Chehock): And that necessitated grading?

A. That necessitated grading and doing everything to [80] meet the subdivision requirements. I might also add that that necessarily followed the plans for the grades and terraces that had to be submitted, or that the city had approved, in order to get that final approval; the plans that had been submitted to them had to be carried out.

Q. Mr. Gowans, you paid the taxes on this property for the years 1946, 1947, 1948, 1949, 1950, 1951 and 1952, yourself, did you not? A. Yes.

(Testimony of Louis L. Gowans.)

Q. Then you paid the taxes—that is, the real property taxes, including whatever taxes were placed on the property, which of necessity included the sand, during that period?

A. I don't know that there was a tax on the sand; I have never heard of it.

Q. The sand is a part of the land?

A. I would say that the contract called only for 250,000 yards of sand at forty cents a yard, plus this work that they did on the subdivision; it did not call for them to pay taxes during these five years, if that is what you mean.

Q. And the extension agreement of May, 1950, there was an additional requirement placed on H. C. and D., one of which was to pay the taxes; and so, on February 2, 1953, you were reimbursed for the taxes you had paid in 1950, 1951, [81] and 1952; is that correct?

A. I think that is correct, but I am not sure. I think the taxes started at the time the agreement extension was negotiated, and I think they were to pay the land taxes from that time on until the—

Mr. Padgett: I will stipulate that that is correct. The document speaks for itself, and makes provision that H. C. and D. will pay the taxes for those three years, the pro rata amount.

Q. (By Mr. Chehock): And that the taxes shown as having been—for which the petitioner was reimbursed in Paragraph T of the stipulation of facts, was actually reimbursed—the actual re-

(Testimony of Louis L. Gowans.)

imbursement was made on February 2, 1953; is that correct?      A. I think so.

Mr. Padgett: Yes.

The Court: Well, very well then. The record will show it is so stipulated.

Mr. Chehock: Your Honor, I am going to offer into evidence a photostatic copy of the 1947 returns of both the petitioners. Does counsel have any objection?

Mr. Padgett: Will the Court give me just a moment?

The Court: Yes.

Mr. Padgett: No objection. [82]

The Court: There being no objection, Respondent's Exhibits A and B are received in evidence.

(The documents above referred to were marked Respondent's Exhibits A and B, respectively, and were received in evidence.)

Mr. Chehock: That is all, your Honor.

### Redirect Examination

By Mr. Padgett:

Q. Mr. Gowans, 1947 was the first year you received any payments for the sand, wasn't it?

A. I think that is correct.

Q. And commencing with the first payment you received, you consistently treated it in your tax return as long-term capital gain?      A. Yes.

Q. Mr. Gowans, you were asked several ques-

(Testimony of Louis L. Gowans.)

tions about a hole in the ground. Did you have anything to do in connection with the actual excavation that H. C. and D. did?      A. No, sir.

Q. When you started out, did you have any idea that they might dig a hole in the ground?

A. I had the idea that they would get the sand, but I had no idea how they would get it.

Q. You were not concerned with that? [83]

A. I was not concerned with that.

Mr. Padgett: I think that is all. Oh, yes, there is one other thing.

Q. (By Mr. Padgett): In September of 1945, the Hasegawa property had already been used to take out the black sand, hadn't it?      A. Yes, sir.

Q. If you had run this road across the Hasegawa property, as it may have been suggested, you would have run into a wall?

A. I think so. I am not certain of that, but they had excavated in there and they more or less did the same thing in removing the sand; they dug a hole where the trucks could run in and load, and out.

Q. Could you have put a road on those premises and subdivided them, without doing grading?

A. No, sir.

Mr. Padgett: That is all.



(Testimony of Louis L. Gowans.)

Recross-Examination

By Mr. Chehock:

Q. And this excavating and digging of this hole you talk about in this other property—was that done prior to 1945?

A. They are still taking sand off of the Hasegawa property. They took it off before that; they have taken it [84] off since and are still taking some off.

Q. Then if you knew that they dug this hole in the property adjoining yours, you had reason to know that H. C. and D., in taking the sand then from your property would probably do the same thing, did you not?

A. Well, I didn't know how they planned to do it. I have no objection to their doing it the most economical way they could do it.

Mr. Chehock: That is all.

The Court: No further questions?

Mr. Padgett: No further questions.

The Court: Very well, you can stand aside.

(Witness excused.)

Mr. Padgett: Your Honor, I have one more witness, who will be rather short.

The Court: Very well, let's finish up before we recess.

Mr. Padgett: Mr. Sayres is the next witness.

## C. D. SAYRES

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: C. D. Sayres. [85]

## Direct Examination

By Mr. Padgett:

Q. Mr. Sayres, what is your occupation?

A. I am treasurer of the Honolulu Construction and Draying Company.

Q. Pursuant to my request, have you brought with you the ledger sheet relating to the payments on the Gowans' sand contract? A. I have.

Q. Were those sheets prepared under your direction? A. They were.

Q. And they are in your custody?

A. Yes.

Q. Mr. Sayres, can you tell us in what manner you carried the payments made to the Gowans, how they were placed in your books, or how they were characterized in your books?

A. There are three different accounts set up in the books, and one was headed, "Referred Royalties," and one was, "Prepaid Royalties," and one was, "Accrued Royalties."

Q. What were the deferred royalties?

A. The deferred royalties were when we assumed the obligation of Mr. Gowans on the note that he had at the bank.

(Testimony of C. D. Sayres.)

Q. How much was that?

A. That was forty-eight thousand and some odd dollars. [86]

Q. That was put on the debit side of your——

A. That was put on the debit side of our ledger.

Q. What did you put as a credit?

A. Accounts payable.

Q. What was the next category of royalties?

A. That was "Prepaid Royalties."

Q. What did they consist of?

A. They consisted of these advances that we made to Mr. Gowans of \$1,050 a month.

Q. How about the house?

A. The house was set up as a prepaid royalty.

Q. How about the \$2,040 per month?

A. The \$2,040 was applied on deferred liabilities, deferred royalties.

Q. That was applied to scale down deferred royalties, as you went along?

A. Yes.

Q. Now, then, what were the accrued royalties?

A. That was a funny situation. Sometimes, in taking out the black sand—and at that time we would remove enough black sand that we would owe Mr. Gowans more than we had advanced him; so then, in the bookkeeping, we had to set up the accrued royalties, and then when we quit taking it, we would show we had overpaid him.

Q. Were there substantial periods of time when you would [87] say you had overpaid Mr. Gowans?

A. Yes, there were.

(Testimony of C. D. Sayres.)

Q. When did you finish charging off the \$19,000 that you expended in building this house for him?

A. That was finished in May, 1948.

Q. When did you start the \$1,050 payments to him?

A. That was from March 1, 1948, to March 31, 1950.

Q. So that there was an overlap between the time—you hadn't finished charging off the house before you started the \$1,050?

A. That is correct.

Q. Mr. Sayres, did you treat the Gowans matter on your books any different from the way you did your other quarrying operations?

A. No. We had various accounts that we were paying royalties to, such as the Bishop Estate, the Campbell Estate, and the Territories, and we have a ledger sheet with eight columns with accrued royalties, and the various royalties and we put the Gowans' account with the others.

Q. Was there any reason for that, Mr. Sayres?

A. No. That was the procedure we had always followed with other firms or outfits that were being paid royalties by us, we just continued in the same method when we handled Mr. Gowans' account.

Q. Well, now, Mr. Sayres, you have used the word [88] "royalty" in in your testimony. What precisely, do you mean by that term?

Mr. Chehock: Now, your Honor, I object to that question as leading; and, furthermore, asking for

(Testimony of C. D. Sayres.)

a conclusion that this witness is not competent to testify to.

Mr. Padgett: Your Honor, here is a man who used the term "royalty" and——

The Court: For whatever it may be worth, I am going to permit the witness to answer.

The Witness: We had contracts that we were paying royalties to on a tonnage or yardage basis, and when the Gowans' contract was signed, we set up the account identically then as we had set up the other accounts.

Mr. Padgett: I think that is all.

### Cross-Examination

By Mr. Chehock:

Q. Mr. Sayres, Mr. Padgett made inquiry and asked you how these payments were recorded on your books, and I think you testified that they were recorded as royalty payments in three different categories, deferred, accrued and prepaid; is that right?      A. That is correct.

Q. Will you carry that one step further, and show how that became a part of your manufacturing operations? Were these payments, then, in fact, a part of your raw materials' inventory?

A. Indirectly, yes; we did not put it into inventory until we had actually removed the sand.

Q. Then what did you do?

A. Then we would credit the proper account, de-

(Testimony of C. D. Sayres.)

pending on whether it was deferred on prepaid or accrued.

Q. And so all that went into these three royalty accounts eventually became a part of your materials inventory; is that not true?

A. That is right.

Q. And, therefore, is reflected as a part of the cost of goods manufactured?

A. That is right.

Mr. Chehock: Will you mark this as an exhibit?

The Clerk: Exhibit C for the Respondent and Exhibit D for the Respondent are marked for Identification.

(Respondent's Exhibits Numbers C and D were marked for Identification.)

Q. (By Mr. Chehock): I hand you Exhibit C for Identification, Mr. Sayres, and ask you if you have looked over the minutes of the directors of the Honolulu Construction and Draying Company, Ltd., for this whole period from 1944 on up through 1952, and ask you if Exhibit C reflects the correct wording of all [90] the minutes that you found in the Minute Book regarding the Gowans' transaction? A. That is correct.

Mr. Chehock: The Respondent offers into evidence Exhibit C, consisting of three sheets.

The Court: No objection, Mr. Padgett?

Mr. Padgett: No objection.

The Court: There being no objection, Respondent's Exhibit C is received.

(Testimony of C. D. Sayres.)

(The documents heretofore marked Respondent's Exhibit C was thereupon received in evidence.)

Q. (By Mr. Chehock): Mr. Sayres, you were subpoenaed here—the Honolulu Construction Company was—to bring in all of the records that you have here regarding the Gowans' transaction, and do you have here in your possession letters written by the Honolulu Construction and Draying Company to Mr. Gowans during the period that the payments were made to him? A. I have.

Q. Also letters written to the bank, and a letter written to the Board of Water Supply?

A. I do.

Q. I hand you Exhibit D, and ask you if the copies of the letters contained in Exhibit D are correct copies of that [91] portion of the letters reflected by the various instruments included in Exhibit D?

Maybe it would be helpful to go letter by letter here, Mr. Sayres.

It will not take too long, your Honor.

The Court: I was just wondering if you could not get them in evidence, and let him check through them after we recess, for correction if there has been any typographical errors. That is the only thing that he may find, isn't it?

Mr. Chehock: I would like to say to the Court that we are not putting in evidence or letters written to Mr. Gowans. Most of these covered letters

(Testimony of C. D. Sayres.)

written towards the end of the year, 1947, 1948, 1949, 1950 and 1951, and that will let the Court see the manner in which the Honolulu Construction and Draying Company handled the accounts, I think.

The Court: Very well. I think the easiest way to handle that would be to offer them in evidence, subject to check by the witness for any typographical errors or corrections. Isn't that satisfactory?

Mr. Padgett: That is all right with me, your Honor, but I would like to ask a couple of questions on voir dire.

Q. (By Mr. Padgett): Mr. Sayres, these are not all of the records—are not all of the letters you wrote to Mr. Gowans? A. No.

Q. Do you have the copies of the other letters which you wrote with you? A. I do.

Q. You have copies of the whole lot?

A. I have the whole file here.

Q. Those are copies? You don't have the originals?

A. No, the original went to Mr. Gowans.

Q. But do you have other copies available for your files? A. No.

Mr. Padgett: Your Honor, I have some very strong objections to put in carefully selected excerpts of long, lengthy correspondence, and I am going to have to offer the whole thing, and ask the Court's permission to allow me to make additional copies, inasmuch as the originals apparently have been kept by Mr. Gowans. I would like, with the Court's permission, to make copies of those which



(Testimony of C. D. Sayres.)

Mr. Chehock is not offering, so that I can get those, and get all of the correspondence in.

The Court: You would have no objection to that, would you?

Mr. Chehock: I have no objection. However, I would like to say this: Counsel has stated they have been [93] carefully selected. I think he will find that all of them used, in substance, the same words, used the word "royalty," and in effect contain, in substance, the same thing, we will be very happy, but I think it is just putting in useless and repetitious type of evidence by putting the whole thing in evidence here.

The Court: Very well. I will receive Respondent's Exhibit D in evidence, with the understanding that the witness can take it and check it for typographical errors; and I will also permit Mr. Padgett, on behalf of the petitioners, to offer as an exhibit such additional letters from the files as the parties can agree upon, I take it.

Mr. Padgett: Very well, your Honor.

Mr. Chehock: You mean today?

The Court: Yes. They are here?

Mr. Padgett: They are here, and I will offer them.

The Court: And you can withdraw them and make copies.

Mr. Padgett: Has the witness identified these sufficiently?

The Court: He can glance through them and see if they are the copies that he wrote.

(Testimony of C. D. Sayres.)

Mr. Padgett: I am not going to raise any objection on the matter of identification.

Mr. Chehock: I might state that, prior to [94] this trial, two days ago, I gave counsel for the petitioners an exact copy of everything that had been offered here, and Mr. Sayres also saw them, and I don't see——

The Court: I don't think there is any question about that. It is purely a question of correcting any typographical errors that may have crept in.

The Witness: These are all typical letters that I did write during that period.

The Court: Very well, Respondent's Exhibit D is received in evidence.

(The document heretofore marked Respondent's Exhibit D for identification was received in evidence.)

Mr. Chehock: I might say that Exhibit D, your Honor, includes twelve separate letters.

The Court: Very well.

Mr. Chehock: That is all.

The Court: Very well, you may inquire, Mr. Padgett.

#### Redirect Examination

By Mr. Padgett:

Q. Mr. Sayres, do you have with you the copies of the letters which you sent to Mr. Gowans?

A. In that file, yes.

Q. I notice one or two of them are attached to notes. [95]

(Testimony of C. D. Sayres.)

A. Those are just the notes that were given to me to write the letters.

Q. Those are interoffice communications?

A. That is all.

Mr. Padgett: Your Honor, I will offer those which have not been offered; I have no segregation of those which have and have not been offered, and those that haven't been have not been put in as a part of D.

The Court: That will be——

Mr. Chehock: Your Honor, I am wondering if this case is going to continue after dinner——

The Court: No, no. We are going to receive this after the petitioners' next exhibit, which will be Petitioners' Exhibit 17. You gentlemen run through them and select the letters which are not included in your Exhibit D, Mr. Chehock, and I will permit the Clerk to receive in evidence, as Petitioners' Exhibit 17, copies of the letters, the other letters from the file, in addition to those.

Mr. Chehock: Do that right now?

The Court: Yes, you can do it right now, if you want to. We will finish the case before you do that.

Mr. Padgett: That is all the questions I have.

The Court: Any further questions?

Mr. Chehock: No further questions. [96]

May I glance at my notes a minute?

Q. (By Mr. Chehock): Mr. Sayres, can you state what the cost of improvements were on this property, exclusive of the building?

A. The total cost of the improvements was \$69,254.23.

(Testimony of C. D. Sayres.)

The Court: Does that show the cost of the building?

A. I have the cost of the building here, and it was \$19,332.81.

Q. (By Mr. Chehock): And that house cost is reflected on your books on or about October, 1946?

A. That is right.

Mr. Chehock: That is all, your Honor.

The Court: Very well.

(Witness excused.)

Mr. Padgett: We rest.

Mr. Chehock: The Respondent rests, but we would like permission to withdraw our exhibit for photostating.

The Court: Withdraw all exhibits?

Mr. Chehock: I will take C and D.

The Court: Leave is given to withdraw Exhibits C and D, and substitute photostatic copies therefor, and it is understood that Petitioners' Exhibit 17 will be supplied to the Court and marked as such, after you [97] gentlemen have selected the letters that go into that exhibit.

Mr. Padgett: May we ask leave thereafter to withdraw and substitute copies?

The Court: Yes. Leave is given to withdraw those exhibits, and substitute photostatic copies or typewritten copies, either, for that matter.

Now, gentlemen, if that is all, what is your pleasure in regard to the time for filing briefs?

Mr. Padgett: Your Honor, because of the length

of the evidence in this case, I have made inquiries as to the transcript, and it will probably be thirty days, so I would like sixty days.

The Court: Sixty days?

Mr. Chehock: Does your Honor want simultaneous or concurrent briefs?

The Court: Well, if you desire more time than that, we will make them consecutive.

Mr. Chehock: I would like more time.

The Court: How much time would you like, after that? That will be sixty days for the Petitioners' brief. How much time would you like following that?

Mr. Chehock: Sixty days.

The Court: Will thirty days be enough time for your reply brief? [98]

Mr. Padgett: Yes.

The Court: Petitioners' original brief to be filed on or before September 22, the Respondent's brief on or before November 22, and thirty days from that.

The Clerk: December 22nd for the Petitioners' reply brief.

The Court: Petitioners' reply brief on or before December 22.

Now, gentlemen, if there is nothing further in connection with this case, we will stand in recess until tomorrow morning at 10:00 o'clock.

(Whereupon, at 12:45 o'clock p.m., the hearing in the above-entitled petition was closed.)

Filed August 30, 1954. T.C.U.S. [99]

[Title of Tax Court and Cause.]

### CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 10, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record," including exhibits I, I-A and II thru XV, attached to the Stipulation of Facts, Petitioners' Exhibits 16 and 17, admitted in evidence and Respondent's Exhibits A thru D, admitted in evidence, in the proceeding before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court proceeding have initiated an appeal as above numbered, and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of August, 1956.

[Seal]      /s/ RALPH A. STARNES,  
Chief Deputy Clerk, Tax  
Court of the United States.

[Endorsed]: No. 15247. United States Court of Appeals for the Ninth Circuit. Louis L. Gowans and Helen T. Gowans, Husband and Wife, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: August 27, 1956.

Docketed: August 31, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 50427

LOUIS L. GOWANS AND HELEN T. GOWANS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### STIPULATION

It is hereby stipulated that the exhibits in the above-entitled cause may be considered by the Court in their original form and need not be reproduced in the printed record.

/s/ FRANK D. PADGETT,

Attorney for the Petitioners.

/s/ CHARLES K. RICE,

Assistant Attorney General,  
Attorney for the Respondent.

[Endorsed]: Filed November 1, 1956, C.C.A.



247  
No. 15,427

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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LOUIS L. GOWANS and HELEN T. GOWANS,  
husband and wife,

*Petitioners on Review,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent on Review.*

**BRIEF FOR LOUIS L. GOWANS AND HELEN T. GOWANS,  
PETITIONERS ON REVIEW.**

---

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FILED

JAN 25 1957

PAUL P. O'BRIEN, CLERK



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No. 15,427

IN THE

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husband and wife,

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vs.

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*Respondent on Review.*

**BRIEF FOR LOUIS L. GOWANS AND HELEN T. GOWANS,  
PETITIONERS ON REVIEW.**

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**JURISDICTIONAL STATEMENT.**

The jurisdiction of the Tax Court of the United States was based upon Title 26 U.S.C. Secs. 272 and 1101 of the 1939 Internal Revenue Code being Secs. 6213, 6214, and 7442 of the 1954 Internal Revenue Code. The jurisdiction of this court is founded upon Title 26 U.S.C. Secs. 7482 and 7483. The decision was entered July 5, 1956, and the petition for review was filed July 20, 1956. (R. pp. 68 and 69-72.)

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**STATEMENT OF THE CASE.**

Petitioners are husband and wife, both employed, who throughout their married lives have combined their earnings, services, and capital. (R. pp. 43, 44.)

In 1944 and 1945 they were the owners of Lot 824 Mikiki Roundtop Lots Honolulu. This property was originally granted to A. V. Gear under the Homestead Laws of the Territory of Hawaii by Land Patent Grant No. 6815. (R. p. 44.) In 1938 Petitioners purchased Lot 822 of said lots by special sale agreement 1762 under the terms of which they were obligated to build a dwelling thereon. (Exhibit II.) Sec. 73 (g) of the Hawaiian Organic Act, 48 U.S.C. Sec. 668 restricts the alienation of such lot by prohibiting any deed or lease to an alien or corporation without the written consent of the Territorial Commissioner of Public Lands and the Governor of the Territory. (Exhibits I-VI.)

The two lots in question contain deposits of a volcanic material known as "black sand" valuable in the manufacture of tile products. Honolulu Construction and Draying Company, Limited hereinafter referred to as "HC&D" offered to purchase approximately 4.33 acres of the two lots to obtain the black sand and Petitioners were willing to sell at the price offered. However, when the matter was given to HC&D's attorney to draw a deed, he determined that the Petitioners had not perfected their title to Lot 822 by erecting a dwelling and that the sale required the written consent of the Commissioner of Public Lands and the Governor. Said consent was requested and refused. (R. p. 46.) (Exhibits III and IV.)

Petitioners and HC&D then hit upon the plan of selling the sand to HC&D in place, HC&D to remove the sand paying 40c per cubic yard and leaving the

area graded with road, water and pipeline improvements installed according to the requirements of the City Planning Commission of the City of Honolulu so that the land might be subdivided and sold. (R. pp. 46 and 47.) HC&D employed Roswell Towill, an engineer and surveyor, instructing him to estimate the amount of black sand available for removal under such a plan and the cost of the subdivision and to draw plans for the subdivision. He did this estimating the amount of sand available between the surface and the projected level of the subdivision at 250,000 cu. yds. (R. p. 47.) Unless the sand had been removed, no subdivision conformable to the requirements of the Planning Commission was possible. (R. p. 117.) Also necessary to the plan was the obtaining of a roadway easement across the adjoining property. This easement was negotiated by HC&D. (R. p. 127.) On September 4, 1945, Petitioners and HC&D entered into an agreement whereby it was agreed that HC&D would buy the sand area, 192,000 sq. ft., if consent from the Commissioner of Public Lands and the Governor could be obtained, and if not, HC&D would buy approximately 250,000 cu. yds. of black sand paying 40c a cu. yd. therefor. HC&D was to quarry the sand within five years, paying for it as hauled away, and leave the property graded for a subdivision and was to install the road and pipeline improvements necessary to obtain the approval of the Planning Commission for such a subdivision. (Exhibit V.)

In September 1945, preliminary approval for the subdivision was obtained from the Planning Commis-

sion. (R. p. 116.) HC&D agreed to build for Petitioners a house on Lot 822 to enable them to perfect their title thereto. The house, which was built in 1946, cost \$19,322.81 and this amount was charged off against the sand as it was removed. (R. pp. 149 and 150.) The house was begun in January 1946 and on completion later that year a land patent for Lot 822 issued to Petitioners. (R. pp. 47 and 48.) (Exhibit VI.)

In May of 1948, the cost of the house was finally completely charged off against the sand removed. (R. p. 150.) In August of 1947 Petitioners had signed a note with the Bishop Bank of Honolulu promising to pay \$70,000.00 in monthly installments of \$1,050.00 (Exhibit IX), and in September of 1947 assigned their rights in the 1945 agreement with HC&D to the Bank as security for the note. (Exhibit VIII.) In March of 1948, HC&D commenced paying Petitioners \$1,050.00 a month regardless of the amount of sand taken out. (R. p. 150.) HC&D did this because of an oral understanding which it had had with the Petitioners from the beginning that the payments over the term of the agreement would be kept level and because sand was not being removed as fast as anticipated. (R. p. 92.) HC&D was delayed until 1947 in starting to remove the sand because of the necessity for Petitioners to clear their title to Lot 822, (Exhibits X, XI), (R. p. 48), and did not therefore remove sand as fast as originally planned. (R. p. 134.) Consequently, it sought and obtained an extension of the time to remove the sand, in return for which it obligated itself to pay \$2,040.00 per month during the remainder of the



extended agreement directly to the Bishop Bank rather than the Petitioners together with the interest on Petitioners' note to the bank which it guaranteed and a proportionate share of the real property taxes. (Exhibit XII) (R. p. 135).

Petitioners, because of the extension, had been compelled to make new financial arrangements to meet their commitment and this occasioned the provision for the payments directly to the Bank by HC&D (R. p. 135). In order to meet the deadline under the agreement as extended, HC&D was compelled to rent extra land and stockpile approximately 100,000 cu. yds. of black sand thereon. (R. p. 93.) HC&D finished removing sand in 1952. (R. p. 49.) Sand removed and payments therefore during the term of the agreement were as follows:

Years	Cu. Yds.	Cash Payments
1947	35,897.47	\$ 14,358.98*
1948	30,694.50	\$ 14,463.83*
1949	40,356.25	\$ 12,600.00
1950	44,492.25	\$ 19,126.57
1951	16,414.50	\$ 24,480.00
1952	81,955.03	\$ 13,974.62
	<hr/>	<hr/>
	250,010.00	\$100,004.00

\*as received by Petitioners; \$13,247.18 (1947);  
\$16,575.63 (1948).

Petitioners returned their receipts from the sand as capital gains. Respondent held them to be ordinary income. (R. p. 50.) Petitioners paid for the years 1948, 1949, and 1950, respectively, as income taxes on account

of sand receipts \$1,656.92, \$1,657.22, and \$2,827.20 for which they filed claims for refund (R. p. 52). Respondent as a result of his determination that sand receipts in 1948, 1949, and 1950 were ordinary income (R. p. 30) determined income tax deficiencies as follows:

1948	\$2,784.52
1949	\$2,016.86
1950	\$4,759.92

Petitioners, having received the deficiency letter, took the matter to the Tax Court where, after hearing, a decision was rendered upholding the determination of the Respondent. (R. p. 68.) Petitioners then filed this petition for review here.

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### QUESTIONS INVOLVED.

There are two questions involved:

The first is whether the sand was a capital asset sold in place by the Petitioners in which case the gain on the receipt from said sale would be capital gains under the then Sec. 117 of the Internal Revenue Code, or whether the Petitioners retained an economic interest in the sand so that the receipts therefrom were ordinary income under the then Sec. 22 of the Internal Revenue Code.

A second question is whether if the Petitioners are correct, they erred in not returning the whole price of the sand as capital gain in 1945 pursuant to the then Sec. 44 (b) of the Internal Revenue Code.

**SPECIFICATIONS OF ERROR.**

1. The Tax Court erred in not holding that as a matter of law the agreement of September 4, 1945, constituted a sale of the black sand in place and that therefore Petitioners thereafter retained no economic interest in such sand.

2. The Tax Court erred in holding as a matter of law that an economic interest was retained in the sand after May 19, 1950 by Petitioners.

3. The Tax Court erred in not holding as a matter of law that since the agreement of September 4, 1945 was a sale and no initial payment was then made, Petitioners should be refunded taxes paid in 1948, 1949, and 1950 on account of income received from the sand.

4. The Tax Court erred in holding as a matter of law that Petitioners retained an economic interest in the black sand present in place on their lots in 1948, 1949, and 1950.

5. The Tax Court erred in holding as a matter of law that the receipts from black sand in 1948, 1949, and 1950 by Petitioners were taxable as ordinary income.

6. The Tax Court erred in failing to hold as a matter of law that since the Petitioners received the total amount of \$48,960.00 for the black sand remaining in place on their premises on May 19, 1950 through the device of a bank loan which the Honolulu Construction and Draying Company, Limited guaranteed and obligated itself to pay at the monthly rate of \$2,040.00 that they thereafter retained no economic interest in the sand.

7. The Tax Court erred in sustaining Respondent's determination of additional taxes due in 1948, 1949, and 1950.

### SUMMARY OF ARGUMENT.

Petitioners sold the black sand on their property lying between the surface and certain fixed grade levels and estimated to be approximately 250,000 cu. yds. to HC&D at a price of 40c per cu. yd. HC&D was to remove this definite amount of black sand within a five-year period and to perform certain work on the premises so as to leave them in a condition permitting subdivision under the rules of the City Planning Commission of the City and County of Honolulu. HC&D was also to install required subdivision improvements. It was the oral understanding of the parties that HC&D would attempt to make the removal of the sand on an even basis so that Petitioners would receive a relatively stable amount each month during the five-year period.

There was no substantial element of uncertainty in what the Petitioners were to receive or in the amount of sand which they were selling. There was no provision for a reverter of the sand to the Petitioners in the event HC&D did not remove it. On the contrary, HC&D's obligation to remove was mandatory. The conduct of the parties with respect to the extension of time for HC&D to remove emphasizes this feature even more strongly. The agreement was in the terms of the sale and was in fact a sale of the mineral in place. In these circumstances, obviously the Petitioners retained no economic interest in the sand which had been sold.

Moreover, regardless of how the agreement of September 4, 1945 may be construed, on May 19, 1950 the

parties entered into an amended agreement whereby HC&D was granted an extension of the time for removal. Under this agreement the Petitioners obtained a loan from the Bishop Bank in the amount of \$48,960.00. HC&D guaranteed this loan to the bank and obligated itself to pay directly to the bank a monthly installment of \$2,040.00 during the remainder of the period for removal of the sand. Petitioners thus received on May 19, 1950, an amount equivalent to 12/13ths of the remaining purchase price of the sand. To say that in these circumstances Petitioners continued to retain an economic interest in the sand on their lots is ridiculous.

The Petitioners having made a sale of the sand in 1945, and not having received a down payment thereon, erred in returning any part of the sales price as income in 1948, 1949, and 1950. Under Sec. 44 (b) of the 1939 Internal Revenue Code they were not entitled to return the sand sales price on an installment basis and therefore they should be refunded the amounts paid in those years.

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#### ARGUMENT.

#### **I. THE AGREEMENT OF SEPTEMBER 4, 1945, CONSTITUTED A SALE OF THE SAND IN PLACE AND THE PETITIONERS THEREAFTER RETAINED NO ECONOMIC INTEREST IN THE SAND.**

The court below in its opinion relied upon the recent case of *Crowell Land & Mineral Corp.* 25 T. C. 223 on the ground that the facts were indistinguishable. The court below also cited *Arthur S. Barker and Alberta C. Barker* 24 T.C. 1160. In both of these cases dissents

were filed in the Tax Court and both are presently on appeal.

The *Crowell* case involved a so-called contract of sale between the taxpayer and a corporation interested in removing the sand and gravel from part of taxpayer's land. The sales agreement purported to sell all the sand and gravel under approximately 23.21 acres of the taxpayer's land at a consideration of 15c per cu. yd. All sand and gravel was to be removed within five years and any such material not removed would revert to the taxpayer. The taxpayer was to be paid \$1,200.00 per year at the beginning of each year and the sand and gravel removed would be credited against this amount until it exceeded the \$1,200.00 after which additional payments would be made. The Tax Court stated:

Payment for deposits only as removed and retention (or retransfer) of title to the balance are typical indicia of the existence of an economic interest.

(*Crowell Land & Mineral Corp.*, 25 T.C. 223)

The Tax Court therefore held that the payments were taxable as ordinary income.

The correctness of the *Crowell* case, as a matter of law, is open to serious question. But setting that feature aside for the moment, it is clear that the facts in our case are so different in several vital particulars that the case is clearly distinguishable.

In the first place, there was to be no reverter of the title to the minerals. HC&D had an absolute obligation to remove all of the mineral matter between the

surface and certain grade levels. This was estimated to be 250,000 cu. yds. HC&D in fact removed 250,010 cu. yds. of black sand. In the *Crowell* case the Tax Court stated:

Not only the time of removal, but the act itself is shrouded in the mists of speculation.

In our case the act of removal is not "shrouded in the mists of speculation". It is required by the agreement within five years, and the time is five years.

In the *Crowell* case any payment over the minimum stipulated in the agreement was contingent on removal of the material. This was not true in the present case.

Petitioners' Exhibit 17 shows that prior to the removal of any sand whatsoever, HC&D constructed a house on Lot 822 at the cost of \$19,322.81 for Petitioners in order to enable them to perfect their title to said lot and to get a patent. Thereafter, the sand as removed was charged against this expenditure by HC&D until such expenditure was completely exhausted in June of 1948. Prior to that time however, in August of 1947 Petitioners had obtained a loan from the Bishop Bank of \$70,000.00 on which they promised to make monthly installments of \$1,050.00 (Exhibit 8), in accordance with the parties' oral understanding that monthly payments would be kept even. HC&D before the exhaustion of the \$19,322.81 advance by way of construction of the house, began in March of 1948 to make monthly payments of \$1,050.00 to Petitioners in order to enable them to meet their commitment at the bank. Except for one or two months, this monthly payment was well

in advance of sand actually removed. This arrangement continued until in May of 1950 the amended agreement was entered into whereby the HC&D agreed with the bank to pay it \$2,040.00 per month regardless of the amount removed. Thus Petitioners were regularly paid in advance of removal and under the 1950 agreement actually received, prior to removal, in a lump sum, 12/13ths of the remaining purchase price of the sand.

The agreement entered into between HC&D and Petitioners is in the terms of a sale of the sand in place.

Unlike the *Crowell* case, the obligation to remove the mineral was fixed and absolute, as is shown not only by the lack of any reverter clause in the instrument itself but by the fact that HC&D was to leave the land graded to levels determined prior to the making of the agreement. In the *Crowell* case the amount of material to be removed and paid for was uncertain. Here it was fixed by the surveyor's mathematical calculation at approximately 250,000 cu. yds. before the agreement was ever drawn. This amount was the minimum which could be removed if grade levels acceptable to the City Planning Commission were to be established. All of these features serve to distinguish this case on the facts from the *Crowell* case.

The case is also distinguishable from *Arthur S. Barker and Alberta C. Barker*, 24 T.C. 1160, also cited by the court below. That was a case in which the Petitioners contracted with a sand and gravel company to remove the sand and gravel beneath certain areas of



land owned by them paying a minimum payment regardless of the amount removed and in addition a royalty fixed at 6c per cu. yd. of commercially removable materials. As the Tax Court pointed out:

It was agreed that Stears was not under any obligation to remove any sand and gravel.

The period of removal was fixed at fifteen (15) years with the gravel company having an option to extend the period for an additional ten (10) years but the amount to be removed was not fixed. The only purpose in the removal was the development of the sand and gravel deposits. Thus the Barker arrangement looks very much like an ordinary minerals lease, in contradistinction to the arrangement entered into in this case where HC&D was obligated to remove the sand, the removal period was extremely short, the amount to be removed was fixed, and preparing the land for subdivision was a major reason for the removal agreement.

It is clear, therefore, that both the *Crowell* and *Barker* cases are distinguishable on the facts from the present case. The test in the past cases of this nature has always been whether or not the taxpayer has retained an economic interest in the mineral in question. If he has parted with his rights and his economic interest, then the sale is taxed under the capital gains provision, whereas if he has retained an economic interest so that his receipts are in the nature of periodic payments such as rent, then it is held that they are ordinary income. *Hamme v. Commissioner*, 209 F.

2d 29 (4th Cir. 1953); *Burton-Sutton Oil Company v. Commissioner*, 328 U. S. 25 (1946); *Lincoln D. Godshall v. Commissioner*, 13 T.C. 681 (1949); *West v. Commissioner*, 150 F. 2d 723 (5th Cir. 1945); *Helvering v. Elbe Oil Land Company*, 303 U. S. 372 (1938).

The court below apparently abandoned this rule since it held in effect that gain on the sale of minerals is taxable as ordinary income in any case where the consideration is measured by the amounts removed. We contend that the court below erred in making the fact that payment was measured by the amount of material removed conclusive on whether the gain was ordinary income. No such talisman is found in the cases. In each case the court must look to the details of the transaction in an attempt to see whether or not an economic interest has been retained.

In *Helvering v. Elbe Oil Land Company*, 303 U. S. 372 (1938), the taxpayer was a California corporation which had certain properties consisting of oil and gas prospecting permits, drilling agreement, leases and equipment. After the discovery of oil the taxpayer sold its interest in those properties to Honolulu Consolidated Oil Company, which paid \$350,000 upon the execution of the agreement and further installments totalling \$1,650,000. In addition, it was provided that after the Honolulu Company had been reimbursed for its expenditures in the acquisition, the taxpayer was to receive monthly one-third of the net profits resulting from the operation of the properties. The agreement was worded in the form of an absolute sale. The taxpayer claimed an allowance for depletion which was

disallowed, the Supreme Court holding that the agreement constituted an outright sale of the properties.

In *Arthur N. Trembley v. Commissioner*, 1948 T.C. Mem. Dec., P-H vol. 17, par. 48,270, the court held that an agreement framed in terms of a sale by which the taxpayer transferred his interest in the sulphur located on certain tracts of land for a fixed cash payment with a provision of a "royalty" of \$1.60 per long ton of sulphur produced on the land constituted a sale of the minerals in place. In so doing, the court placed reliance on the substantial nature of the fixed compensation and on the fact that there was no requirement for the development of the sulphur on the land. From these facts, it appeared that the agreement was not entered into for the purpose of exploiting the mineral.

In *Hamme v. Commissioner*, 209 F. 2d 29 (4th Cir. 1953), at the expiration of a preceding lease the taxpayer entered into an indenture by which it was provided that in consideration of \$2,000.00 in cash and of "certain royalty payments" the taxpayer bargained and sold certain equipment, leases and real property. The amount of royalty payments was fixed by a simultaneous contract by which the royalties were to be based on net sales or net mint or smelter returns at the rate of 10% on minerals other than tungsten ores and at fixed percentages based on the quality of the tungsten ores which might be extracted. A minimum of \$10,000 in royalties was to be paid every six months regardless of sales. The payments were cumulative so that any excess over the \$10,000 in one six months'

period could be carried forward and applied to the minimum in the subsequent period. The Court of Appeals stated:

Thus we cannot rely solely upon the words contained in the instruments or upon the acts of the parties thereunder to determine the tax consequences of this agreement. The Tax Court has quite properly applied to this problem the same test that is applied in determining whether depletion allowances may be taken by a taxpayer; for it is only where the taxpayer has retained an economic interest in properties or mineral rights thereon that depletion allowances are proper.

\* \* \* \* \*

In 1932, the Supreme Court decisively settled the point that the retention of an oil royalty or permanent right to participate in "gross" receipts constituted an economic interest. (209 F. 2d 32, 33.)

In *Lincoln D. Godshall v. Commissioner*, 13 T. C. 681 (1949), the taxpayer and owner of mining rights contracted to let and grant possession of them to a corporation under a lease with option to purchase. The down payment was \$11,000 and after payment of \$139,000 rental the purchaser was to have a deed of the mining rights. The court stated:

In our opinion petitioner and his associates clearly reserved an economic interest in the ore by their instrument of transfer. They recited a consideration of \$139,000 as total "rental" payable, but, apart from the initial deposit of \$11,000 none of this "rental" was a fixed liability. By subsequent provisions of the contract it was to be satisfied, if at all, by specified "royalties" on the

ores actually mined, and if ore production should prove to be small or unprofitable, Shoshone was free to terminate the contract without further obligation than the payment of "rental" or "royalties" on such tons as it had extracted at that time. (13 T.C. 684-5.)

In *West v. Commissioner*, 150 F. 2d 723 (5th Cir. 1945), the taxpayers conveyed title to certain lands and the minerals in and under other land, excepting from the conveyance certain royalties of oil, gas and other minerals, particularly described in a supplemental contract. The agreement purported to be a transfer of a  $\frac{5}{8}$ ths interest in the oil produced to the purchaser,  $\frac{3}{8}$ ths thereof being retained by the taxpayer. The court held that on a review of all the factors, the transaction, despite the terminology used, more nearly resembled a lease than a sale. In so doing it reviewed the various paragraphs of the agreement one by one, pointing to the similarity between them and ordinary oil leases. It also placed heavy reliance on the fact that the predominating purpose of the agreement appeared to be the economic exploitation of the minerals.

In *Otis A. Kittle v. Commissioner*, 21 T.C. 79 (1953), the taxpayer was the owner of  $\frac{1}{6}$ 3rd interest in mineral rights appurtenant to certain Minnesota iron ore properties. Upon the expiration of a preceding lease the owner entered into an agreement entitled an "amended lease" whereby the lessee was to pay over a 20-year period a minimum of \$10,000, based upon an iron ore royalty of 50¢ per ton. The lease was

to run for 50 years. If the lessee took out less than 20,000,000 tons in the first 20 years it might take out ore up to the 20,000,000 tons thereafter without further payment of any royalty thereon and if it took out more than the 20,000,000 tons it was to pay for the excess at 50c per ton. The court held that the agreement was a lease and that the petitioner retained an economic interest in the 20,000,000 tons of ore, that it was not a sale in place of the 20,000,000 tons because the minimum payment of \$10,000 was merely a provision for minimum royalties and not the sale price of the ore in place. See also *Burton-Sutton Oil Company v. Commissioner*, 328 U. S. 25 (1946).

As we have said previously, no one fact or factor is a talisman which in all cases will give the answer as to whether or not the landowner has retained an economic interest in the minerals. In the *Kittle* case and to some extent in the *West* case the factor which tipped the balance in favor of a decision that the owner had retained an economic interest in the mineral was the presence in the transfer agreements of covenants usually found in leases. This indicated to the court that the transfer actually was a lease and not a sale.

In contrast, the agreement of September 4, 1945, which is Exhibit V in this case, is worded in the terms of a sale, and many of the usual lease covenants are missing. Thus, covenants with regard to strip or waste, fencing, insurance, repair, lessor's right of entry for purposes of inspection, lessor's approval of plans for improvements, forfeiture, payment of taxes and other

charges, maintenance of the premises in a clean and sanitary condition and in obedience to rules and regulations of health and other authorities, are missing.

Under the agreement the land in toto is to be sold to the buyer if permission for such sale can be obtained, and if not, then the buyer is to remove the black sand and put in the subdivision improvements. The various obligations undertaken by the buyer under paragraphs 3, 4, 5 and 6 of the agreement are all concerned with the withdrawal of the sand and payment therefor and with the installation of the subdivision improvements. They bear little or no resemblance to lease covenants.

Of particular significance is the fact that the agreement is in the terms of seller and buyer and is in the alternative. It shows clearly that in the thinking of the parties the agreement was for a sale. They were attempting to make a sale of the land, and failing permission for that, to make a sale of the sand in place. As Mr. Gowans stated, this alternative amounted, from petitioners' point of view, to a sale of the land in two steps. He stated:

It amounted to a 2-part sale, the land and the sand. If Mr. Bush could not buy the whole thing, the sand developed in the creating of the subdivision would be sold to Mr. Bush, and then I could sell the land any way I saw fit. (Tr. p. 68.)

It is thus apparent that the factor relied on in the *Kittle* and *West* cases to indicate a lease rather than a sale, in this case tips the balance the other way and indicates a sale rather than a lease.

In the *Hamme* case, *supra*, the owner's payment was to be a percentage of the gross receipts from the sale of the ore produced. The court in that case held that the fact that the owner was to be paid a percentage of gross receipts of itself indicated the retention of an economic interest. In the agreement of September 4, 1945, however, the price per cubic yard was the flat fixed sum of 40¢. Thus the factor relied on in the *Hamme* case to produce the conclusion that an economic interest had been retained is missing in our case.

In the *Godshall* case, *supra*, in deciding that there had been the retention of an economic interest the court placed its reliance upon the fact that by far the greater share of payments going to the owner was contingent upon oil or gas being produced on the land and that if there was no such production the agreement might be cancelled by the lessee. In our case, however, while payment is to be measured by production, there is no contingency in the matter of production. As the testimony shows, the sand had been measured prior to the agreement's being entered into with almost incredible accuracy and production was required by the terms of the agreement. The sand was known to be there and the agreement required its removal.

Moreover, the parties had an oral understanding that production would be kept at an even pace so as to balance out the payments over the term of the agreement. As a result, when production was not so maintained HC&D went ahead and made payments anyway, far in advance of actual production. Thus the



factor which tipped the balance in the *Godshall* case is missing in our case.

In the *Trembley* case a factor on which much reliance was placed in reaching the conclusion that there had been a sale of the minerals in place was the fact that no production was required. In our case, on the other hand, production is required but the situation is very different from that pertaining in the usual minerals agreement. In such an agreement the reason for requiring production is to secure the exploitation and development of the mineral so that the owner may be paid, and this is held to indicate the retention of an economic interest. In this connection, the court in that case quoted its statement in an earlier case that:

*In our opinion the predominating purpose of the present contract was to secure the exploitation and development of the properties for oil, gas and other minerals, a fact clearly evidenced by the care the petitioners used in drafting the duties, obligations, and covenants imposed on and accepted by Humble. (Emphasis supplied)*

(17 TC Mem. Dec. P-H par. 48,270, p. 864)

Of course, in our case, while the length of time within which removal was to be made was influenced by HC&D's original purpose to remove on a pay-as-you-go basis and was the subject of bargaining between the parties (Tr. p. 69), it is obvious that the predominating purpose in requiring removal of the minerals was to permit the development of the land. The owners were anxious to sell the land but were unable to do so with it in its natural state. Removal of the sand was a legal and a practical necessity before

the land could be subdivided and sold. (Tr. pp. 50, 53, 75.) As the agreement shows, if permission could have been obtained to sell the land to HC&D the petitioners would have done so. Failing that, they still wanted to sell the land and the alternative proposal was the means by which they were enabled to do so. Removal of the sand was a prerequisite to their carrying out this 2-step sale. Thus the requirement of removal of the sand does not in this case indicate the retention of an economic interest.

The factor which tipped the balance in the *Elbe Oil Land* case, *supra*, in favor of a construction that there had been a sale appears to have been the fact that a very substantial initial payment was made by the purchaser. Such a payment is missing with respect to the agreement of September 4, 1945, but on the other hand, the factor of contingency present in that case as to the additional payments is not present here. The sand was known to be there and the amount was capable of very accurate estimation. Moreover, the price was fixed and not dependent on the profits or sales of HC&D. HC&D was required to remove the black sand from the surface down to certain graded levels, taking out 250,000 cubic yards within a 5-year period and paying therefor 40¢ per cubic yard. In practice HC&D was permitted to take sand below the grade level where it was of usable quality and to fill in the resulting holes with non-usable material above the level. The amount of sand actually taken, however, was 250,010 cubic yards as against the beginning estimate of 250,000 cubic yards. A consideration of surrounding

circumstances in our case shows clearly that there was no factor of contingency in the production and this would seem to outweigh by far the lack of an initial payment.

The court below appears to have been somewhat influenced by the fact that HC&D in many of its letters and on its books referred to the payments as royalties and the fact that they were so referred to in the agreement of May 19, 1950 indicates a lease rather than a sale. However, the same use of the word "royalty" was present in the *Trembley* case and was held not to be decisive just as the use of the terminology of a sale in the agreement is not of determining significance.

HC&D's actions cannot change the nature of the transaction nor bind the petitioners, who had no control over HC&D's bookkeeping methods. It is at best an indication of intention and is certainly counterbalanced by the statement of HC&D's president that it was his intention to purchase the sand in the beginning. (R. p. 95.) If intention is to be the determining factor then the fact that both parties to the agreement testify that they intended it to be a sale of the sand, together with the use of sale terminology in the agreement, should weigh heavily in petitioner's favor.

Moreover, we call attention to the fact that when the agreement of May 19, 1950 was signed, HC&D set up on its books the total amount remaining to be paid under that agreement as a liability on the debit side of its ledger. (R. pp. 148, 149.) Thus, from that time on

the land could be subdivided and sold. (Tr. pp. 50, 53, 75.) As the agreement shows, if permission could have been obtained to sell the land to HC&D the petitioners would have done so. Failing that, they still wanted to sell the land and the alternative proposal was the means by which they were enabled to do so. Removal of the sand was a prerequisite to their carrying out this 2-step sale. Thus the requirement of removal of the sand does not in this case indicate the retention of an economic interest.

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at least, HC&D's own bookkeeping acknowledged the existence of an absolute liability under the agreement.

Considering the agreement as a whole, in the light of the surrounding circumstances it would appear that it was in fact an agreement for the sale of the sand in place. Every factor relied on in the cases weighs in favor of that conclusion in this case.

Even more indicative of a sale than these factors are the surrounding circumstances. Petitioners' land lies on a steep sloping mountainside. They desired to sell a portion of it. They could not sell it to HC&D because of restrictions on their title. They could not subdivide it and sell it as house lots because of the requirements of the City Planning Commission. So they sold the sand above certain grade levels to HC&D, requiring its removal and exacting as consideration 40¢ per cubic yard and certain subdivision improvements. Then they were in a position to sell the land. The transaction with HC&D was quite literally a sale of a slice out of the side of the mountain. To term it a lease is to ignore the legal prohibition against such leases, Section 73, Hawaiian Organic Act, 48 U.S.C. Section 668, and the facts as to what was sought to be done and actually done.

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**II. EVEN IF IT SHOULD BE HELD THAT AN ECONOMIC INTEREST WAS RETAINED IN THE MINERAL UNDER THE 1945 AGREEMENT NO SUCH INTEREST WAS RETAINED UNDER THE AGREEMENT OF MAY 19, 1950.**

On May 19, 1950 petitioners and HC&D entered into an amended agreement whereby the time for removal

of the black sand and the installation of subdivision improvements was extended for one year and HC&D bound itself to pay to the Bishop Bank \$2,040.00 per month on the principal of petitioners' note with the bank of even date in the amount of \$48,960.00. HC&D also agreed to pay the interest on the note and a pro rata share of the real property taxes. (Ex. XII.) As the agreement shows, the petitioners were to get the \$48,960.00 by a loan from the bank and then HC&D was to pay back this loan to the bank at fixed monthly sums regardless of the amount of sand taken out. After the bank was paid back then any additional payments on account of sand removed coming due were to be paid to petitioners. This agreement was in fact carried out.

It is difficult to see how it can logically be argued that any economic interest was retained by the petitioners after the agreement of May 19, 1950, regardless what the ruling may be with respect to the agreement of September 4, 1945. As the new agreement shows, of the approximately 133,000 cubic yards of black sand remaining to be removed at that time, petitioners by the device of the loan from the bank, which would be repaid by HC&D, received \$48,960.00 or the equivalent of payment for 122,400 cubic yards of sand immediately. HC&D obligated itself to pay that amount at fixed monthly payments regardless of the amount of sand removed in the period. Previous to this time, as the testimony shows, HC&D had removed sand only as it had market for it. Now, however, in order to meet the established deadline it was forced to remove the

sand and stockpile it and it actually stockpiled some 100,000 cubic yards.

Surely it cannot be said that petitioners had retained an economic interest in the sand when they in fact had already been paid for some 12/13ths of it and when HC&D was required to remove and pay for the other 1/13th within a little over two years. If an agreement whereby an owner is paid in advance a fixed amount constituting over 92% of the total consideration for minerals in place regardless of the amount which may be removed does not constitute a sale of those minerals in place, then it is not possible to have a sale of the minerals in place. In both the *Elbe Oil Land* case, *supra*, and the *Trembley* case, *supra*, it was the factor of a large fixed initial payment, regardless of production, which seemed to be uppermost in the court's mind in ruling that there had been a sale and that no economic interest was retained. Certainly our case is stronger than either of the other two, for the percentage of the total consideration paid in advance is much greater. Unlike the *Trembley* case, of course, the removal of the minerals was required within a fixed period, but, as we have pointed out earlier, the predominating reason for that, even under the 1945 agreement, was so that the petitioners might be in a position to subdivide and sell the land. Since the agreement of May 19, 1950 did not link together payment and removal of the sand, the only economic reason remaining for requiring the removal of the sand was petitioners' desire to have the land placed in a condition where it could be subdivided and sold.



Clearly, therefore, the requirement of removal does not indicate a retention of an economic interest in the sand, but indicates quite the contrary. Petitioners, having sold the sand and having been paid therefor, wanted it removed from the land so that they could make use of the land. We submit that regardless of what construction is placed upon the earlier agreement, all payments after May 19, 1950 were properly returned as payments from the sale of a capital asset rather than ordinary income.

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**III. THE AGREEMENT OF SEPTEMBER 4, 1945 HAVING BEEN A SALE AND NO INITIAL PAYMENT HAVING BEEN MADE, PETITIONERS SHOULD BE REFUNDED TAXES PAID IN 1948, 1949 AND 1950 ON ACCOUNT OF INCOME RECEIVED FROM THE SAND.**

Petitioners mistakenly returned all payments received on account of the sand in the years 1948, 1949 and 1950 as payments on account of the sale of a capital asset in those years. They thus treated the agreement of September 4, 1945 as an installment sale of real property involving deferred payments. (Sec. 44 (b) I.R.C.) However, under Regulations 111, Section 29.44-2, in effect at the time that the agreement and the returns were made, petitioners should have returned the whole amount to be received on account of the sand sales price in 1945, since no initial payment was made by the purchaser at that time. The payments thus made by them in the years in question were erroneous.

Even if it be argued that there was no sale in 1945 because petitioners did not get their title to Lot 822 until May of 1946 (Ex. VI), although they had title to Lot 824 previously and the sand was located on both, certainly the sale took place when they did get title in 1946, and since no payments were made on account of sand until 1947 (R. p. 49) the same argument applies with equal force. This being so, petitioners are entitled to a refund of the amounts paid in 1948, 1949 and 1950 on account of receipts from sand, to-wit, \$1,656.92, \$1,657.22 and \$2,827.70.

---

### CONCLUSION.

For the reasons stated above the judgment of the Tax Court should be reversed, and an order entered giving judgment in favor of the petitioners as prayed in their petition before the Tax Court.

Dated, Honolulu, Hawaii,  
January 8, 1957.

Respectfully submitted,

FRANK D. PADGETT,

*Attorney for Petitioners.*

ROBERTSON, CASTLE & ANTHONY,  
*Of Counsel.*

No. 15,247

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**LOUIS L. GOWANS AND HELEN T. GOWANS, HUSBAND  
AND WIFE, PETITIONERS**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES**

---

**BRIEF FOR THE RESPONDENT**

---

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**FILED**

**FEB 28 1957**

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**BRIEF FOR THE RESPONDENT**

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**OPINION BELOW**

The memorandum findings of fact and opinion of the Tax Court (R. 53-67) are not officially reported.

**JURISDICTION**

This petition for review (R. 69-72) involves income taxes for the taxable years 1948, 1949, and 1950, in the total amount of \$15,703.14 (R. 6, 70). On June 5, 1953, the Commissioner of Internal Revenue mailed to taxpayers a notice of deficiency in the amount of \$9,561.30. (R. 28-29.) On September 4, 1953 (R. 3), taxpayers filed a petition (R. 5-27) with the Tax Court for a redetermination of that deficiency under the pro-

visions of Section 272 of the Internal Revenue Code of 1939. The decision of the Tax Court was entered on July 5, 1946. (R. 4, 68.) The case is brought to this Court by petition for review filed July 20, 1956. (R. 60-72). Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

#### QUESTIONS PRESENTED

1. Whether the Tax Court erred in holding the payments received by taxpayers in the years 1948, 1949, and 1950, for black sand removed from their land were taxable as ordinary income.

2. Whether taxpayers are entitled to refunds of amounts paid by them, as capital gain, on such income in those years.

#### STATUTES AND REGULATIONS INVOLVED

These may be found in Appendix A, *infra*.

#### STATEMENT

The facts, as stipulated and as found by the Tax Court (R. 53-65), may be summarized as follows:

At the beginning of the taxable year 1948 taxpayers owned two adjoining lots, Nos. 822 and 824, Makiki Round Top Lots, Honolulu. Lot 824, containing approximately three acres, was acquired in 1932. In 1937 taxpayers erected their home on it. Lot 822, containing approximately three acres, was purchased at public auction in 1938. The lots were situated on a hillside, and portions were so steep as to require extensive grading before they could be improved by buildings. By virtue of quarrying in the surrounding area taxpayers became aware that portions of their land contained black sand, a volcanic deposit or material used



in the construction of cinder and concrete building blocks. (R. 54.)

The Honolulu Construction and Draying Company, Limited, hereinafter referred to as Draying Company, is a Hawaiian corporation engaged in business as a general construction contractor and manufacturer of tile. In the fall of 1944 it offered to purchase from taxpayers that portion of lot 824 not essential to their home-site and the corresponding portion of lot 822, totalling approximately 4.4 acres, each lot being a source of black sand. It was discovered that taxpayers had not perfected title to lot 822 by erecting a residence thereon, as required by law, and also that under applicable law the lots could be used for residential purposes only and could not, without the consent of the Commissioner of Public Lands and the Governor, be conveyed to a corporation. Permission to convey the lower portion of lot 822 to Draying Company on condition that a house be constructed thereon, was requested in November, 1944, and refused. (R. 54-55.)

Thereafter taxpayers and Draying Company conceived a plan whereby the latter could obtain the black sand it needed for commercial purposes and taxpayers could fulfill their obligation to erect a residence on lot 822. Draying Company employed Rosewell Towill, an engineer and surveyor, to determine the amount of black sand in the lower portions of both lots which it was economically feasible to remove, while having the area graded for use as a subdivision. His survey estimated that there were approximately 250,000 cubic yards of black sand beneath the surface of approximately 192,000 square feet of the sand area, which was the minimum amount that would have to be removed.

He further estimated that it would cost approximately \$32,000 to grade the area conformably to the subdivision requirements after the removal of the overburden and the installation of a water pipeline and an access road. (R. 55-56.)

On September 4, 1945, taxpayers and Draying Company entered into the following written agreement (Stip. Ex. V):

THIS AGREEMENT, made this 4th day of September, 1945, by and between LOUIS L. GOWANS and HELEN T. GOWANS, of Honolulu, City and County of Honolulu, Territory of Hawaii, hereinafter called the "Seller," and HONOLULU CONSTRUCTION AND DRAYING COMPANY, LIMITED, a Hawaiian corporation, hereinafter called the "Buyer",

WITNESSETH: That

WHEREAS the Seller is the owner of or has a certain interest in Lots 822 and 824 of the Makiki Round Top Lots; and

WHEREAS a portion of said two lots comprises an area of approximately 192,000 square feet, hereinafter called the "Sand Area", as shown on a survey recently prepared by R. Towill; and

WHEREAS, Buyer has estimated that the Sand Area has within it approximately 250,000 cubic yards of black sand which the Buyer wishes to acquire for business purposes; and

WHEREAS, it is feasible and desirable to remove approximately 250,000 cubic yards of black sand from the Sand Area, and with proper grading thereafter to leave the Sand Area in a condition practicable and usable for home building sites, pro-

vided a 30-foot roadway can be obtained over and across certain intervening land owned by Fusao Hasegawa and Yoshiko H. Eguchi leading from the said area out to Round Top Drive; and

WHEREAS the Seller is presently negotiating with said Hasegawa and Eguchi for such a 30-foot roadway; and

WHEREAS the Buyer is ready and willing either to buy the interest of the Seller in the land comprising the Sand Area, or to quarry, buy and haul away black sand therefrom, and the Seller is ready and willing to sell same subject to prior consent thereto being given by the Commissioner of Public Lands, upon the terms and conditions hereinafter set forth;

NOW THEREFORE, in consideration of the premises and the agreements hereinafter set forth on the part of the Seller and Buyer to be observed and performed, the Seller and Buyer agree as follows:

The Buyer hereby covenants and agrees to and with the Seller, his heirs and assigns:

1. To procure, at its own expense, a survey plan of subdivision of the Sand Area locating and showing thereon also a 30-foot roadway leading from the Sand Area over and across land owned by said Hasegawa and Eguchi to Round Top Drive;

2. With the consent of the Commissioner of Public Lands first obtained, to purchase all the right, title and interest of the Seller in and to the Sand Area, and to pay the Seller therefor the purchase price of Fifty Cents (50¢) per square foot of land within the Sand Area according to said survey;

3. If the consent of the Commissioner of Public

Lands to purchase the said interest of the Seller in and to the sand area cannot be obtained, but if permission to quarry and withdraw black sand from the Sand Area is obtained within a reasonable time after the date hereof, then the Buyer will quarry and haul away from Sand Area approximately 250,000 cubic yards of black sand and will pay Seller therefor at the rate of Forty Cents (40¢) per cubic yard for all black sand so withdrawn, on the following terms:

(a) To pay the Seller on or before the 15th day of each month for all black sand withdrawn during the month prior thereto;

(b) To keep accurate books of account and upon request to permit the Seller to examine the same;

(c) To save harmless the Seller from all loss, costs, damages, claims or suits of whatsoever nature resulting directly or indirectly from the operation of quarrying and removing black sand;

(d) Within five (5) years from the date hereof to quarry and remove approximately 250,000 cubic yards of black sand from the Sand Area;

4. After the completion of the removal of black sand as above provided, and before the expiration of five (5) years from the date hereof, to complete the grading of the proposed lots within the Sand Area subdivision, and to leave same in good order and condition for sale and use as building sites with road and water mains as shown by plans approved by the City Planning Commission,

5. Within five (5) years from the date hereof to grade and pave that portion of the 30-foot roadway, as shown on the subdivision map, which lies

within the land presently owned by said Hasegawa and Eguchi, in such manner as will satisfy the minimum requirements of the City Planning Commission, and in such manner as will make the same available for use to the owners of the lands comprising the premises owned by said Hasegawa and Eguchi;

6. Also within the said roadway, within said 5-year period, to install a water pipe line which will also be available for use to the owners of the Hasegawa and Eguchi premises and to be of such size and laid in such manner and connected with the Honolulu Water Supply System, as will satisfy the minimum requirements of the said City Planning Commission.

The Seller covenants to and with the Buyer, its successors and assigns, as follows: to sell and convey his interest in the land comprising the Sand Area, or approximately 250,000 cubic yards of black sand, upon the terms and conditions above set forth, and provided the consent thereto is first obtained from the Commissioner of Public Lands, and provided also that the necessary right of way is first obtained from said Hasegawa and Eguchi.

IT IS MUTUALLY AGREED by and between the Seller and the Buyer as follows:

(1) With the consent of the Commissioner of Public Lands first obtained, the Seller's interest in the land shall forthwith be sold and conveyed to the Buyer and payment therefor made in preference to sale and withdrawal of black sand;

(2) That this agreement shall become effective and shall remain in force and effect upon obtaining

the appropriate approval and consent of the Commissioner of Public Lands, and not otherwise;

(3) In the event the Seller sells his interest in the Sand Area to the Buyer, property taxes shall be prorated as of the date of delivery of the deed;

(4) If the premises or any portion thereof are taken by condemnation proceedings and at the time title thereto remains in the Seller, then all compensation payable or to be paid for such taking shall belong to and be the sole property of the Seller, and the Buyer shall have no interest therein whatsoever, but this contract shall thereupon cease and determine with respect to the area or areas so taken.

In September, 1945, preliminary approval for the subdivision and the grading levels was obtained from the Planning Commission.

In order to aid taxpayers in perfecting their title to lot 822, Draying Company built a house thereon, begun in January, 1946, and completed in May, 1946, at a cost of \$19,322.81. Draying Company was reimbursed through credits to taxpayers' account as royalties were earned, payment being completed in May, 1948. (R. 60.)

Since taxpayers did not perfect title to the lot until completion of the residence in May, 1946, Draying Company was delayed until July 1, 1946, in commencing performance under the agreement. In the removal of the black sand Draying Company was permitted to take quantities below the grade level where it was of usable quality and to fill the resulting holes with non-usable material. (R. 60.)

In 1947 taxpayers executed a note with the Bishop

National Bank of Hawaii, promising to pay \$70,000 in monthly installments of \$1,050 each. They assigned their rights in the agreement with Draying Company as security for the note. Draying Company was willing to make payments to the bank at such uniform rate since the parties had an oral understanding that production would be kept at an even pace over the five-year period. (R. 60-61.)

On May 19, 1950, taxpayers and Draying Company entered into an agreement (Stip. Ex. XII) extending the time for completion of the agreement to July 1, 1952, and providing that Draying Company would make monthly royalty payments of \$2,040 to the Bishop National Bank until a note of taxpayers for \$48,960 was paid off, and thereafter would make all further payments of royalty to taxpayers. It refers to the provisions of the earlier agreement and recites that the Buyer still has the right and obligation to remove approximately 133,000 cubic yards of black sand upon royalty payment of forty cents per cubic yard, and irrevocably assigns future royalty payments to the bank until the new note is paid. (R. 61-64.)

In order to meet the deadline of July 1, 1952, Draying Company rented extra land and stockpiled approximately 100,000 cubic yards of black sand. It finished its operation in 1952. (R. 64-65.)

Sand removed and payments made were as follows:

Years	Cubic Yards	Cash Payments
1947.....	35,897.47	\$ 14,358.98
1948.....	30,694.50	15,463.83
1949.....	40,356.25	12,600.00
1950.....	44,692.25	19,126.57
1951.....	16,414.50	24,480.00
1952.....	81,955.03	13,974.62
Total.....	250,010.00	\$100,004.00

The above payments were charged on the books and records of Draying Company to royalty accounts either as prepaid or accrued, dependent upon the amount of black sand actually removed during the period of payment. In its correspondence with taxpayers concerning payments Draying Company regularly referred to the payments as royalties. (R. 65.)

On their income tax returns for 1948 to 1950, inclusive, taxpayers reported the respective amounts of \$14,653.60, \$12,600, and \$17,086.57 as long-term capital gain from the sale of a capital asset taxable at the rate of 50 per centum. In determining his deficiency the Commissioner increased the amounts reported and held that the full amounts were taxable as ordinary income. (R. 65.)

For each of the taxable years 1948, 1949, and 1950, taxpayers did not claim and the Commissioner did not allow any amount for depletion of the black sand. (R. 65.)

The court below held that during each of the taxable years 1948, 1949, and 1950, taxpayers retained an economic interest in the black sand in place contained on their lots, and that the amounts received under the contract are taxable as ordinary income. (R. 66.) The court held that the decision in the case of *Crowell Land & Mineral Corp. v. Commissioner*, 25 T. C. 223, appeal argued, January 28, 1957 (C. A. 5th) (Appendix B, *infra*), is controlling here. (R. 66.)

Taxpayers presented an additional contention, that the agreement of September 4, 1945, having been a sale, and no initial payment having been made, they should have reported the gain as income of the year of the sale. They were not entitled to report the payments received



in 1948, 1949, and 1950, on the installment basis, they assert, and accordingly are entitled to a refund for those years. Since the Tax Court held that the payments were taxable as ordinary income it did not reach this contention.

#### SUMMARY OF ARGUMENT

### I

Taxpayers entered into a contract with Draying Company whereby the latter was to remove approximately 250,000 cubic yards of black sand from taxpayers' land, paying 40 cents per cubic yard. Under the principles applicable to the extraction of natural resources the payments received by taxpayers from the extraction of the sand were taxable as ordinary income if under the agreement taxpayers retained an economic interest in the sand in place, prior to its removal.

Taxpayers did retain such an economic interest, their income being dependent upon extraction and measured by it. They retained the fee interest in the land, paid the taxes on the entire property, reserved the right to the entire compensation paid if the premises were taken by condemnation, and necessarily had a reversion of all the sand not extracted within the time limits set by the agreement. The agreement did not have the characteristics of an outright sale, there being no precise agreement as to the specific property included, no deed conveying title, no fixed purchase price payable in all events. The agreement, and the conduct of the parties under it, bring the transaction within those where the payments are held to be ordinary income, subject to a depletion allowance, rather than capital gain.

## II

Taxpayers' alternative contention, that they are liable for no taxes at all upon the payments received in the taxable years, was not reached by the Tax Court. If this Court should disagree with the Tax Court on the first point, a remand would be necessary for fact findings essential for a determination as to whether taxpayers improperly reported the gain on the installment basis, and if it be held that they did, whether they are nevertheless taxable on the payments in question.

## ARGUMENT

## I

**The Payments Received by Taxpayers for the Sand in the Taxable Years Were Taxable as Ordinary Income Since Taxpayers Were the Possessors of an Economic Interest in the Sand**

Whether the payments received by taxpayers in 1948, 1949, and 1950, were taxable as ordinary income turns on the question whether under the agreement with Draying Company they retained an economic interest in the black sand in place on their lots.

The concept of economic interest arises from "the peculiar character of the business of extracting natural resources." *Burton-Sutton Oil Co. v. Commissioner*, 328 U. S. 25, 33. Their mining is treated as an income-producing operation, not as a conversion of capital investment as upon a sale. But minerals and natural deposits are recognized as wasting assets, and as compensation for the capital asset consumed in the production of income through severance the owner is entitled to a deduction from gross income for depletion, which is

regarded as a tax-free return of the capital consumed. *Anderson v. Helvering*, 310 U.S. 404, 407-408.

If the owner has completely disposed of his interest in the mineral, however, there is a sale of that interest, subject for tax purposes to capital gains treatment. In deciding the nature of the transaction, the nature of the income and the right to a depletion allowance have always been considered as related questions. He who has an economic interest in the mineral receives ordinary income and is entitled to a deduction for depletion. On the other hand, upon an outright sale, the seller who retains no economic interest is not entitled to a depletion allowance on the payments. The payments received in the transaction are either ordinary income or capital gain or loss, the taxpayer having no right of election as to which is more favorable to him. Although the taxpayers here do not seek depletion allowances,<sup>1</sup> another taxpayer in similar circumstances would be entitled to that allowance and might by the present taxpayers' argument be precluded from obtaining it. In *Palmer v. Bender*, 287 U. S. 551, 557, the test for determining whether a taxpayer retained an economic interest, and accordingly whether the income received was ordinary income, was set out in broad terms:

The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital.

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<sup>1</sup> Prior to 1951 only ordinary cost depletion was available for sand and gravel. By Section 319(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452, sand and gravel were added to the list of products qualifying for percentage depletion.

Again in *Burton-Sutton Oil Co. v. Commissioner*, 328 U. S. 25, 32, the Court explained that—

It seems generally accepted that it is the owner of a capital investment or economic interest in the oil in place who is entitled to the depletion.

and that (pp. 34-35)—

Depletion depends only upon production. It is the lessor's lessee's or transferee's "possibility of profit" from the use of his rights over production, "dependent solely upon the extraction and sale of the oil," which marks an economic interest in the oil.

Most recently in *Commissioner v. Southwest Expl. Co.*, 350 U. S. 308, 314, the Court quoted from *Palmer v. Bender*, *supra*, and stated that the two factors of (1) having acquired, by investment, an interest in the oil in place and of (2) securing income derived from the extraction of the oil, to which he must look for a return of his capital constitute the requirement of "an economic interest."

See also the recent opinion of this Court in *Usibelli v. Commissioner*, 229 F. 2d 539, where the basic considerations involved in determining the presence of an economic interest in a mineral in place are reviewed.

Judged by these tests, taxpayers here had an economic interest in the sand. There is no question as to the first factor, that they acquired their interest in the sand by investment. It is equally clear that their income was secured by extraction of the sand, to which they looked for a return of their capital.

Article 3 of the contract (Ex. V) provides that Draying Company will "quarry and haul away" approxi-

mately 250,000 yards of sand, and will pay "at the rate of" 40 cents per cubic yard for all black sand "so withdrawn." Payment is to be made each month as the sand is withdrawn. This provision is precisely within the tests set out. If the question were the related one of taxpayers' right to depletion, the deduction for depletion would be allowed since the income was based upon the extraction of the sand, but only as and to the extent that sand was removed.

If, however, we are to look beyond the precise language of the Supreme Court, it becomes even more apparent that the taxpayers retained an economic interest in the sand in place. They point out (Br. 12) that in the *Crowell* case there was a specific provision for reverter of the unremoved sand at the end of five years, where here there was no reverter clause. But as the Tax Court pointed out in the *Crowell* case (Appendix B, *infra*), in the usual mineral lease, at the end of the lease period the unremoved mineral automatically reverts to the fee owner, without a reverter clause, citing *Burnet v. Harmel*, 287 U. S. 103. Here the contract had a specific five-year limitation, so significant that Draying Company was willing to bargain for a one-year extension. The effect of that period of limitation is clearly that at the end of the agreed upon time Draying Company would have no further right to the sand.

Under the agreement, therefore, Draying Company acquired title to the sand only as it was removed, and was obligated to pay for it only as it was removed. Taxpayers retained ownership until the act of removal, with complete ownership remaining in any sand not removed during the five-year or extended period during which Draying Company had the right to extract and remove sand.

Taxpayers, while arguing that Draying Company had an obligation to remove the sand (Br. 13), do not suggest that its rights in unremoved sand continued beyond the five-year period, nor do they suggest what would happen to the unremoved sand other than to revert to them. Under these circumstances the obligation to remove sand is no more than the customary obligation to exploit a mineral lease.

Furthermore, the agreement itself shows that taxpayers retained an interest in the sand until it was removed. Paragraph (4) provides that if the premises or any portion are taken by condemnation proceedings, and at the time title remains in taxpayers (an obvious reference to the alternative attempted sale of the fee to Draying Company), then all compensation for such taking shall belong to and be the sole property of taxpayers, Draying Company shall have no interest therein whatsoever, and the contract shall cease and determine with respect to the area taken. This is completely inconsistent with the claimed sale of a body of sand in place. If the agreement were such a sale, Draying Company would be entitled to just compensation for its sand. On the contrary, the provision contemplates taxpayers as being the ones entitled to compensation for the sand as well as other property taken.

Of course, as the Court decided in *Helvering v. Elbe Oil Land Co.*, 303 U. S. 372, and in *Anderson v. Helvering*, 310 U. S. 404, the owner of minerals may make an outright sale and divest himself of all economic interest therein. Taxpayers assert that that is what they did here. But in the former case the taxpayer had never owned any of the land in fee; in the latter case the Court emphasized the fact that the seller conveyed not

only its royalty interests and oil and gas rights but also its fee interests. In the present case, on the contrary, taxpayers did not convey the fee, but only rights to the sand deposits. See *Commissioner v. Crawford*, 148 F. 2d 776 (C. A. 9th).

Taxpayers argue (Br. 244) that the transaction was an outright "sale of a slice out of the side of the mountain" down to predetermined grade levels, rather than a disposition of sand. But the entire transaction is inconsistent with such a sale. The parties, in actually carrying out the contract, disregarded those grade levels in so far as extraction of the sand was concerned. Draying Company went below the pre-determined levels to take out from 80,000 to 100,000 yards of sand, leaving a hole, about 40 feet wide, 150 feet long, and 70 feet deep, which it filled up with hard rock. (R. 101-102.) Also, there was no instrument conveying any specifically described piece of property. There was no provision during those years for Draying Company to pay taxes on the property which it is now asserted belonged to that company. On the contrary taxpayer paid the taxes himself for all the years from 1946 through 1952. (R. 143-144.) The contract contained no provision for any lump sum payments. Although the expense of constructing a house on Lot 822 in order that taxpayers might get clear title was borne by Draying Company and may be considered as initial payments, it was treated as advance royalties, to be worked off in terms of cubic yards of sand removed, rather than as a portion of a total purchase price. (Ex. VII.)

Taxpayers argue that the fact that the agreement is phrased in terms of a seller and buyer is of particular significance (Br. 12, 19) while arguing that the fact

that Draying Company consistently referred to the payments as "royalties" is to be disregarded (Br. 23). It is settled, however, that the terminology used does not determine the question, either way. *Palmer v. Bender*, 287 U. S. 551, 555-556; *Burton-Sutton Oil Co. v. Commissioner*, 328 U. S. 25, 32; *West v. Commissioner*, 150 F. 2d 723, 726 (C. A. 5th). It is the acts of the parties and the actual effect of their promises which determine the tax consequences. *Hamme v. Commissioner*, 209 F. 2d 29, 31, 32 (C. A. 4th).

Again, taxpayers attach significance to the fact that payments were made by Draying Company in advance of sand actually removed. (Br. 11-12.) But advance or minimum payments are consistent with a lease. *Kittle v. Commissioner*, 21 T. C. 79, affirmed, 229 F. 2d 313 (C. A. 9th). In fact, however, there were occasions when the payments ran behind the removal of sand, but Draying Company's books showed a credit to taxpayers. (R. 149). The regularity of payments, then, is not evidence that the transaction was a sale. Payment was still agreed to be out of production.

Taxpayers alternatively argue that even if the 1945 agreement was not a sale, its amendment in 1950 converted it into a sale. (Br. 24-27.) The amendment, however (Ex. XII), besides extending the time for Draying Company to remove the sand, merely increased the periodic payments and provided for Draying Company to make them to the bank on behalf of taxpayers, until their note should be paid off. Thereafter payments were to be made directly to taxpayers again. In so far as Draying Company was concerned, its obligations under the agreement remained essentially the same as before. In so far as taxpayers were concerned they continued to be paid on the basis of



production, retaining the same economic interest as before.

To summarize, the contract here had the characteristics of the usual mineral lease: payment was to be made only as the sand was removed and at a rate fixed by the removal; there was an obligation to exploit derived from the time limit, with all rights to revert to the owner of the fee at the expiration of that time limit; the fee was retained by taxpayers; in the event of condemnation the owners were to receive in full all payments and Draying Company's right to remove should terminate; the owners continued to pay all taxes on the entire property. Conversely, the characteristics of an outright sale were lacking; there was no lump sum payment either made or agreed upon; Draying Company was not obligated to pay in all events any fixed total amount of any fixed installments; there was no deed of conveyance; there was no fixed description of the property, Draying Company being permitted to take nearly 100,000 of the 250,000 yards from below the grade level and to reject an equal amount of material from above the grade level. In these circumstances taxpayers retained far more than has been required to meet the test of an economic interest, and can in no way be said to have disposed of their entire interest in the sand.

**Taxpayers' Alternative Contention That for the Taxable Years (1948, 1949, and 1950) They Were Liable for No Taxes on Account of Income Received From the Sand, Even as Capital Gains, Is Without Record Foundation, Is Incorrect and, in any Event, Would Require Remand in the Tax Court for Decision**

In their last point (Br. 27-28) and in two cursory paragraphs taxpayers claim they are not liable for any taxes whatsoever for the taxable years (1948, 1949, and

1950)—not even as capital gains—on income derived from the black sand. Indeed, they request refund of the taxes already paid by them for those years on the capital gains basis.

The Tax Court, having decided the issue discussed in Point I, *supra*, in the Commissioner's favor, never reached this contention and did not pass on it. Likewise if this Court agrees with the Tax Court on Point I, namely, that the payments received for the sand during the taxable years were ordinary income, it is unnecessary for this Court to afford consideration to this Point II.

However, if this Court disagrees with the Tax Court on Point I, remand in the Tax Court would become necessary for fact findings essential for determination as to whether or not taxpayers improperly, as they now contend, reported their capital gain on the transaction on an installment basis. Thus, it will become necessary to determine what was the year of the sale for this purpose (1945, or 1946 when taxpayers obtained title to lot 822). It will also become necessary to find when the initial payment was made. In stating that there were no payments on account of sand until 1947, taxpayers ignore the fact that in 1946 Draying Company paid \$19,322.81 to build a house for them on lot 822 (R. 60, 158), for which the company was to be reimbursed through credits as royalties were earned (Ex. VII). Such advance payments may be held to qualify as initial payments. Taxpayers, therefore, properly reported the income on the installment basis.

Again, taxpayers' argument that they should have returned the whole amount of the alleged capital gain on the contract in 1945 or 1946, is based on the premise

that their fair market value of the unexecuted contract was ascertainable in those years (see Section 111(b), Internal Revenue Code of 1939). But this record clearly does not establish that its value was ascertainable in those years and, if so, in what amount.

Again, when the facts are found, the impact of Section 3801 of the 1939 Code must be considered.

#### CONCLUSION

The decision of the court below is correct and should be affirmed. If this Court should disagree the case should be remanded for further findings relative to Point II.

Respectfully submitted,

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FEBRUARY, 1957.

## APPENDIX A

## Internal Revenue Code of 1939:

## SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

\* \* \* \* \*

(m) *Depletion*.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. \* \* \* In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. \* \* \*

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 23.)

## SEC. 44. INSTALLMENT BASIS.

\* \* \* \* \*

(b) *Sales of Realty and Casual Sales of Personality*.—In the case of (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding \$1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 30 per centum of the selling price (or in case the sale or other disposition was in a taxable year beginning prior to January 1, 1934, the percentage of the selling price prescribed in the law applicable to such year), the income may, under

regulations prescribed by the Commissioner with the approval of the Secretary be returned on the basis and in the manner above prescribed in this section. As used in this section the term "initial payments" means payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 44.)

**SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.**

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money).

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 111.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

**SEC. 29.44-2. Sale of Real Property Involving Deferred Payments.**—Under section 44 deferred-payment sales of real property include (a) agreements of purchase and sale which contemplate that a conveyance is not to be made at the outset, but only after all or a substantial portion of the selling

price has been paid, and (b) sales in which there is an immediate transfer of title, the vendor being protected by a mortgage or other lien as to deferred payments. Such sales, either under (a) or (b), fall into two classes when considered with respect to the terms of sale, as follows:

(1) Sales of property on the installment plan, that is, sales in which the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable year in which the sale is made do not exceed 30 percent of the selling price;

(2) Deferred-payment sales not on the installment plan, that is, sales in which the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable year in which the sale is made do not exceed 30 percent of the selling price.

In the sale of mortgaged property the amount of the mortgage, whether the property is merely taken subject to the mortgage or whether the mortgage is assumed by the purchaser, shall be included as a part of the "selling price," but the amount of the mortgage, to the extent it does not exceed the basis to the vendor of the property sold, shall not be considered as a part of the "initial payments" or of the "total contract price," as those terms are used in section 44, in sections 29.44-1 and 29.44-3, and in this section. The term "initial payments" does not include amounts received by the vendor in the year of sale from the disposition to a third person of notes given by the vendee as part of the purchase price which are due and payable in subsequent years. Commissions and other selling expenses paid or incurred by the vendor are not to be deducted or taken into account in determining the

amount of the "initial payments," the "total contract price," or the "selling price." The term "initial payments" contemplates at least one other payment in addition to the initial payment. If the entire purchase price is to be paid in a lump sum in a later year, there being no payment during the first year, the income may not be returned on the installment basis. Income may not be returned on the installment basis where no payment in cash or property, other than evidences of indebtedness of the purchaser, is received during the first year, the purchaser having promised to make two or more payments in later years.

SEC. 29.44-3. *Sale of Real Property on Installment Plan.*—In transactions included in class (1) in section 29.44-2 the vendor may return as income from such transactions in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the property is paid for bears to the total contract price.

\*            \*            \*            \*            \*

SEC. 29.44-4. *Deferred-Payment Sale of Real Property Not on Installment Plan.*—In transactions included in class (2) in section 29.44-2, the obligations of the purchaser received by the vendor are to be considered as the equivalent of cash to the amount of their fair market value in ascertaining the profit or loss from the transaction.

\*            \*            \*            \*            \*

If the obligations received by the vendor have no fair market value, the payments in cash or other property having a fair market value shall be applied against and reduce the basis of the property sold, and, if in excess of such basis, shall be tax-

able to the extent of the excess. Gain or loss is realized when the obligations are disposed of or satisfied, the amount being the difference between the reduced basis as provided above and the amount realized therefor. Only in rare and extraordinary cases does property have no fair market value.

---

APPENDIX B

OPINION

The Tax Court of the United States

Filed October 31, 1955

Docket No. 53476

CROWELL LAND & MINERAL CORPORATION, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Amounts received by petitioner pursuant to an agreement transferring rights to remove sand and gravel over a 5-year period and fixing the payments by reference to a price per unit, subject to advance payments, held taxable as ordinary income and held, further, not subject to an allowance for discovery depletion.

Richard L. Crowell, Esq., for the petitioner.

Robert B. Wallace, Esq., for the respondent.

Opportunity, Judge: Respondent determined a deficiency of \$1,839.12 in petitioner's income tax for 1949. The issues for decision are whether payments, received by petitioner during 1949 under a "Contract of Sale" of gravel, represent long-term capital gain, as reported by petitioner, or ordinary income, as determined by respondent, and if they represent ordinary income,



whether petitioner is entitled to an allowance for discovery depletion. The parties have filed a stipulation of facts, all of which are hereby found accordingly.

Petitioner is a corporation whose income tax return for 1949 was filed with the collector of internal revenue for the district of Louisiana.

Petitioner entered into a "Contract of Sale" dated January 8, 1947, with Gifford-Hill and Company, Inc., a corporation. The contract, which named petitioner the vendor and Gifford-Hill the vendee, provided that the vendor sold to the vendee, with full warranty of title, "All gravel, sand, mixed sand and gravel, railroad ballast and other similar construction materials situated on and under" the piece of land described in the instrument, consisting of about 23.21 acres. Prior to the consummation of the contract there was found to be a substantial deposit of sand and gravel on this land. Tests were made but it was impossible to determine the exact quantity of sand and gravel thereon.

Under the agreement, "The consideration for this sale and transfer is the payment by the Vendee unto the Vendor, the sum of Fifteen (15¢) cents per cubic yard" for "each and every cubic yard thus mined and removed" payable \$1,200 upon the execution of the instrument and \$1,200 "at the beginning of each year, thereafter during the term of this Contract of Sale" as advance payments, and 15 cents per cubic yard additional when the amount removed equaled the cumulative advance payments. The agreement provided that upon default the contract would be canceled and the vendee would reconvey all of the remaining property to petitioner. The vendee was given 5 years within which to go upon the property and remove the subject material after which its rights terminated and the property was to revert to the vendor, the vendee to execute a reconveyance of the remaining property. The vendee

was given the right to construct, maintain and take away necessary camps, tracks and other improvements. Any timber cut in the course of removing the materials was to be delivered to and remain the property of the vendor and any damaged timber was to be paid for by the vendee at stated prices. The vendor was to pay advalorem taxes on the land and the vendee was to pay severance or other taxes imposed for materials removed by it under the agreement. The vendee was to hold the vendor harmless from all damage to persons or property resulting from its operations. Vendor and vendee agreed that any mineral operations of the vendor and the operations of the vendee would be carried on so that neither would interfere with the other.

Petitioner, in 1949, was the fee owner of more than 100,000 acres of land in Louisiana which had been acquired in 1941, and this is the only instance in its history of a contract of any nature concerning sand and gravel deposits underlying any of its land. The sand and gravel deposit in controversy was not carried or listed in the inventory of petitioner.

The purchaser removed the sand and gravel under the contract and thereafter, as a result, the 23.21-acre tract was mostly covered with water.

Petitioner received \$14,147.04 under the contract during 1949 and reported the amount as a long-term capital gain. Respondent determined that the amount represented ordinary income.

While the concept of taxable gain implies that a taxpayer shall be authorized to recover his capital in some manner, a number of methods to accomplish this are available. That provision is made for a return of capital as an offset against taxable income is accordingly of little assistance in determining whether a specific transaction gives rise to ordinary income or capital gain. If

capital gain, the investment is to be recovered by means of an allocated basis. Section 111(a), Internal Revenue Code of 1939. If ordinary income, an elaborate system has been established by means of depreciation, depletion and other processes to achieve a similar result. And percentage depletion, section 114(b)(3) and (4), Internal Revenue Code of 1939, discovery depletion, section 114(b)(2), Internal Revenue Code of 1939, and unit depletion are all various means of accounting for depletion. Unit depletion, for example, may be available when discovery depletion is not. Cf. *Parker Gravel Co.*, 21 B.T.A. 51, with *Robert Roberts*, 20 B.T.A. 345.

It is clear, however, that if depletion of any kind is available it must be because the taxpayer has retained an economic interest in the mineral in place. *Anderson v. Helvering*, 310 U.S. 404; *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25. The principle is that as the mineral is removed, and not before, the taxpayer is being deprived of a part of his property and simultaneously using up a corresponding portion of his basis. Presumably since the process of removal is not subject to prophetic anticipation the income is to be accounted for from time to time as it is actually earned. Thus, the present agreement, although it purports to pass present title to all minerals involved, calls for payment, except for the guaranteed amounts, only as the sand and gravel is "mined and removed from said premises."

Not only the time of removal, but the act itself is shrouded in the mists of speculation. At the end of the lease period, even if none is removed, the mineral remaining is not the property of the lessee, but of the lessor. In the usual mineral lease, this results automatically, see, e.g., *Burnet v. Harmel*, 287 U.S. 103, while here there is an express provision to that effect. The difference cannot be decisive. Payment for de-

posits only as removed and retention (or retransfer) of title to the balance are typical indicia of the existence of an economic interest.

It is idle to suggest that these transactions do not somewhat resemble sales, just as a lease of real property has aspects of the day-by-day conveyance of the property to the tenant. As each cubic yard of sand or each ton of coal or metal ore is removed and the owner is paid for that much of the mineral, the transfer is indeed in many ways comparable to the sale of a capital asset. This is so whether the arrangement calls for so much a yard or a ton, *Bankers' Pocahontas Coal Co. v. Burnet*, 287 U.S. 308, *Otis A. Kittle*, 21 T.C. 79, or a varying amount depending upon retail price, *William Louis Albritton*, 24 T.C. 903, net profit, *Burton-Sutton Oil Co. v. Commissioner, supra*, or the like. The continuous deterioration of other property compensated for by depreciation has also been likened to a series of fractional sales. *United States v. Ludey*, 274 U.S. 295. That detail of income tax accounting has not sufficed to transform an item accountable for as ordinary income into capital gain.

The recovery of capital by depletion in the case of minerals is comparable to the process of deducting for depreciation. *United States v. Ludey, supra*; *Choate v. Commissioner*, 324 U. S. 1. And by the same token when, under a mineral lease, the property is removed bit by bit and the consideration for it is paid over a number of years, the impelling reason for conferring upon a taxpayer the benefit of capital gains treatment tends to disappear. He does not receive in one year, subject to high surtax rates, the proceeds of an asset which may actually represent the cumulation of increments in value over a long period. See H. Rept. No. 350, 67th Cong., 1st Sess. (1921), p. 10; S. Rept. No. 275, 67th Cong., 1st Sess. (1921), p. 12. On the con-

trary, provisions in the present agreement expressly granting rights to the use of the ~~surface~~ <sup>surface</sup> ~~surveys~~ are spread over the entire 5-year term and are presumably being paid for from year to year. *Burnet v. Harmel, supra.*

In the case of the kind of agreement with which we are here confronted, it is of little consequence whether it is described as a lease, royalty agreement, bonus, advance royalty or other arrangement for periodic payment. *Arthur S. Barker*, 24 T.C. 1160. The typical treatment has been to regard the proceeds as ordinary income. *Burnet v. Harmel, supra*; *Hamme v. Commissioner*, (C.A. 4) 209 F. 2d 29, certiorari denied, 347 U.S. 954. Both as a consequence and as a compensation the taxpayer has been accorded the privilege of offsetting the receipts by depletion allowances. *Palmer v. Bender*, 287 U. S. 551.

As we said in *William Louis Albritton, supra*:

But the nature of the income and the taxpayer's right to a depletion allowance have always been considered as related questions. \* \* \* Another taxpayer under similar circumstances but seeking to obtain the benefit of depletion might make this petitioner's argument in reverse. If we were to sustain petitioners here, that taxpayer would have to be frustrated.

This is reinforced in the case of sand and gravel by the provisions of the Internal Revenue Code of 1939, section 114(b)(4)(A)(i), as amended by section 319(a), Revenue Act of 1951, extending to the owners of sand and gravel deposits the benefits of percentage depletion. See also, e.g., *United States v. Cherokee Brick & Tile Company*, (C.A. 5) 218 F. 2d 424. If these receipts are to be considered as capital gain recoverable by an allocation of the taxpayer's basis rather than as ordinary income with a corresponding deduction for depletion, it seems to us to lie within the province of

Congress to create that variation in approach.<sup>1</sup> On the basis of the authorities as they now exist we are unable to sustain petitioner's contention.

Petitioner's alternative claim is that it is entitled to "discovery depletion." No factual foundation for such a deduction appears in the record, and with the case in its present posture, discovery depletion—as opposed to depletion generally—was not available to this petitioner. *Parker Gravel Co., supra.*

Reviewed by the Court.

Decision will be entered for the respondent.

Murdock, J., dissenting: The petitioner was not engaged in the business of selling sand or gravel or in the business of selling sand and gravel deposits. Counsel for the respondent refers to this contract of sale as a lease, regards it as similar to an oil and gas lease, and claims that the payments received were royalty payments under a lease rather than amounts realized from the sale of a capital asset. His basis for calling the instrument a lease instead of a contract of sale, as it purported to be, is based primarily upon the method of payment and the limitation of five years allowed for the removal of the material.

The cases cited by the Commissioner are all part of a line of decisions of which *Burnet v. Harmel*, 287 U.S. 103 and *Palmer v. Bender*, 287 U.S. 551 are early examples. The rules established by that line of cases are that any one who was entitled to receive a portion of the mineral extracted or produced from a property, a

---

<sup>1</sup> Congress has evidenced its views to that effect with respect to coal, section 325, Revenue Act of 1951, and timber, section 127, Revenue Act of 1943. But that legislation extends only to coal and timber and does not include such other natural deposits as metal ores, *Otis A. Kittle*, 21 T.C. 79, oil and gas or sand and gravel, *William Louis Albritton*, 24 T.C. . . . (August 16, 1955).

portion of the income from the operation of the mineral property or an amount based upon the income or the value of the mineral produced from the property, had an "economic interest" in the mineral in place and as that interest was depleted by the production operation the person was entitled to recovery through depletion, particularly percentage<sup>2</sup> depletion based upon the gross income from the property, and the amount he received for his retained share of production or as his share of the profit from or value of the production was taxable as ordinary income rather than gain from the sale of a capital asset.<sup>3</sup> The *Harmel* and *Palmer* cases involved oil and gas leases and most of the cases following them also involved mineral leases under which the taxpayers became parties to the extracting operations so that a part of the gross income from the properties was their income.

The present case presents a different situation. The petitioner sold the material here in question for a fixed price, 15 cents per cubic yard removed. Nothing was to vary that price or the vendee's obligation to pay it. The entire purchase price would be paid in less than five years if the material was all removed sooner. The five years was not a rental period. The petitioner was not entitled to receive or to be credited with any part of the material as removed. It was not to share in any profit or income derived by the vendee from the removal

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<sup>2</sup> The natural deposit here involved was not subject to percentage depletion in 1949, the petitioner claims no depreciation under this sale contention, and both parties recognize that no mining is involved herein. See section 114(b)(4); *Parker Gravel Co.*, 21 B.T.A. 51.

<sup>3</sup> However, *Helvering v. Elbe Oil Land Development Co.*, 303 U.S. 372, held that there was a sale of a capital asset even though the seller was to share in the net profits of production.

of the material. The amount the petitioner was to receive did not depend in any way upon the vendee's income from the removal of the sand and gravel or upon the unit or other value of the material removed. The total amount received by the vendee from the sale by it of material removed belonged to it and no part thereof belonged to the petitioner. Cf. *Thomas v. Perkins*, 301 U.S. 655; *Anderson v. Helvering*, 310 U.S. 404. The contract of sale here was substantially different from the mineral leases involved in the cases cited by the petitioner and the facts that the method of payment here was based of necessity upon the amount of material removed, a time limit for removal was set and the vendee was permitted to come upon the property to remove the purchased material are <sup>also</sup> sufficient to twist this contract of sale into a lease similar to the mineral leases in the cases cited by the Commissioner.

The petitioner argues that the contract was in all respects a contract of sale rather than a lease, the five years was regarded as ample time by the parties to permit the removal of all of the material and the method of payment was made necessary by their inability to determine in advance just how much material was there. The Commissioner does not advance any sound reason for regarding this instrument as a lease instead of a contract of sale, and he cites no authority which really supports his argument. The stipulation shows that the gravel deposit was a capital asset of the petitioner which it had held for more than six months prior to sale, and the gain should be treated for income tax purposes as a long-term capital gain. This is a stronger case for capital gain treatment than cases involving sales of standing timber where payment was from profits. See *John W. Blodgett*, 13 B.T.A. 1388; *J. J. Carroll*, 27 B.T.A. 65 affd 70 F. 2d 806; *Estate of M. M.*



*Stark*, 45 B.T.A. 882; *Camp Manufacturing Co.*, 3 T.C. 467; *Isaac S. Peebles, Jr.*, 5 T.C. 14; *Warner Mountains Lumber Co.*, 9 T.C. 1171; *United States v. Robinson*, 129 F. 2d 297.

Johnson and Fisher, J. J., agree with this dissent.  
(Seal)



No. 15,247

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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LOUIS L. GOWANS and HELEN T. GOWANS,  
husband and wife,

*Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

**PETITIONERS' REPLY BRIEF.**

---

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**FILED**

MAR 25 1957

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**PETITIONERS' REPLY BRIEF.**

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**INTRODUCTION.**

Petitioners in their opening brief pointed out that the court below in its opinion relied upon its decision in *Crowell Land & Mineral Corp.*, 25 T.C. 223, in giving judgment for the Respondent upon the ground that the facts were indistinguishable. Petitioners also noted that the court below in its opinion also cited *Arthur S. Barker and Alberta C. Barker*, 24 T.C. 1160.

Petitioners then pointed out that the facts in the *Crowell* case were distinguishable from the facts in the present case (Br. pp. 10-12), as were the facts in *Barker* (Br. pp. 12, 13). The remainder of their

argument under point I in that brief (Br. pp. 14-24) was devoted to showing that the question for decision was whether or not they had retained an economic interest in the black sand under the 1945 agreement. As noted (Br. p. 14), it appeared that the decision in the *Crowell* case marked a departure from this time-honored test, for the Tax Court apparently held that a gain on a transaction involving minerals would be taxable as ordinary income in any case where the consideration was measured by the amounts removed.

It is significant to note that Respondent's brief filed herein does not attempt to support the decision below on its own basic ground, i.e., that the facts here are indistinguishable from those in the *Crowell* case, nor does it attempt to support *Crowell* as a matter of law or even cite or mention *Barker*. Instead, Respondent agrees that the question to be decided here is whether, under the terms of the agreements which are Exhibits V and XII, Petitioners retained an economic interest in the black sand which was the subject matter of those agreements.

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### ARGUMENT.

#### I. PETITIONERS RETAINED NO ECONOMIC INTEREST IN THE BLACK SAND UNDER THE 1945 AGREEMENT.

Respondent quotes from *Burton-Sutton Oil Company v. Commissioner*, 328 U.S. 25 (1946) at pages 34 and 35, where the Supreme Court stated:

“It is the lessor's, lessee's or transferee's ‘possibility of profit’ from the use of his rights over



production, 'dependent solely upon the extraction and sale of the oil', which marks an economic interest in the oil."

Respondent also cites *Commissioner v. Southwest Exploration Co.*, 350 U.S. 308 (1956) at page 314 for the proposition that the existence of an economic interest requires two factors: (1) the acquisition by investment of an interest in the mineral in place, and (2) the securing of income derived from the extraction of the mineral. Respondent would perhaps have been somewhat fairer had he pointed out that the Supreme Court, further down on the same page, went on to say:

"The second factor has been interpreted to mean that the taxpayer must look *solely* to the extraction of oil or gas for a return of his capital, and depletion has been denied where the payments were not dependent on product, *Helvering v. Elbe Oil Land Co.*, 303 U.S. 372, or where payments might have been made from a sale of any part of the fee interest as well as from production. *Anderson v. Helvering*, 310 U.S. 404."

The agreement of September 4, 1945, provided in part:

"WHEREAS a portion of said two lots comprises an area of approximately 192,000 square feet, hereinafter called the 'Sand Area', as shown on a survey recently prepared by R. Towill; and

WHEREAS Buyer has estimated that the Sand Area has within it approximately 250,000 cubic yards of black sand which the Buyer wishes to acquire for business purposes; . . .

The Buyer hereby covenants and agrees to and with the Seller, his heirs and assigns:

. . .

2. With the consent of the Commissioner of Public Lands first obtained, to purchase all the right, title and interest of the Seller in and to the Sand Area, and to pay the Seller therefor the purchase price of Fifty Cents (50¢) per square foot of land within the Sand Area according to said survey;

3. If the consent of the Commissioner of Public Lands to purchase the said interest of the Seller in and to the Sand Area cannot be obtained, but if permission to quarry and withdraw black sand from the Sand Area is obtained within a reasonable time after the date hereof, then the Buyer will quarry and haul away from the Sand Area approximately 250,000 cubic yards of black sand and will pay Seller therefor at the rate of Forty Cents (40¢) per cubic yard for all black sand so withdrawn . . .”

In connection with this agreement, the oral understanding of the parties that the payments under the agreement would be kept at an even pace must also be borne in mind. As is stipulated on pages 60 and 61 of the Record:

“In August, 1947, petitioner executed a note with the Bishop National Bank of Hawaii, promising to pay \$70,000 in monthly installments of \$1,050 each. In September, 1947, petitioners assigned to the Bishop National Bank of Hawaii their rights in the 1945 agreement with the corporation as security for the \$70,000 note. Dray-

ing Company was willing to make the payments to the bank at such uniform rate since the parties had an oral understanding that production would be kept at an even pace over the five-year period called for by the 1945 agreement.”

In this context Petitioners contend that the payments to them were not dependent *solely* upon the *extraction* of the minerals but were part of the purchase price of the mineral in place.

In *Helvering v. Elbe Oil Land Co.*, 303 U.S. 372 (1938), the agreement between the parties called for the payment of some \$2,000,000 to the seller, plus one-half of the net profits earned by the buyer from the oil and gas production on the property. The Supreme Court held that the agreement to pay one-half of the net profits was a personal covenant of the buyer and did not indicate that the seller had retained an economic interest in the property.

In *Anderson v. Helvering*, 310 U.S. 404 (1940), the agreement called for the payment of a total purchase price of \$160,000, payable \$50,000 in cash and \$110,000 from one-half of the proceeds received by the buyer which might be derived from the oil and gas produced from the properties and/or from the sale of the fee title to any or all of the land conveyed. As in *Elbe Oil Land Co.*, *supra*, the question arose as to whether the proceeds derived by the seller from the operation of the oil and gas property came from property in which the seller had retained an economic interest. The court held that the receipts did not. The

court stressed the fact that the additional payment might have come from the sale of the fee as well as from production of oil and gas, and stated that inasmuch as there could be no question in the case of an additional payment from the sale of the fee, it was obvious that when the additional payment was made as a result of production of oil and gas, no economic interest had been retained by the seller.

In the present case, as the testimony reveals, the primary interest of the parties was in a sale of the property (R. p. 97). As a result, the 1945 contract was drawn providing for the sale of 192,000 square feet of land from Petitioners to the Draying Company at a price of 50¢ per square foot—in other words, a purchase price of \$96,000. In the alternative, the contract provides that the Draying Company will remove approximately 250,000 cubic yards of black sand, paying 40¢ per cubic yard, or \$100,000.

In the construction of contracts the rule in Hawaii, as elsewhere, is that the cardinal purpose is to ascertain the intention of the parties, which is gathered not from particular words and phrases but from the agreement as a whole. This will be given effect if it can be done consistently with legal principles. *Hawaiian Pineapple Co. v. Saito*, 24 Hawaii 787 (1919). In the present case it is obvious from the alternative provisions of the agreement that what the parties were attempting to accomplish was a sale of the fee, if possible, and if not, to come as close to it as possible. The fact that the cash consideration moving from

the buyer to the sellers under either alternative was approximately the same, further bears out this intention of the parties. Obviously, therefore, under the agreement the Petitioners' possibility of profit was not dependent solely upon the extraction of the mineral. On the contrary, had the parties been able to obtain the consent of the Commissioner of Public Lands, the consideration would have been received from the sale of the fee.

The agreement provided for a payment of 40¢ per cubic yard of black sand removed during a five-year period. The testimony in the trial showed that there was no substantial uncertainty as to the amount of sand which would be removed under the agreement. The amount had been estimated by an engineer at 250,000 cubic yards before the agreement was entered into (R. p. 47). The agreement, Exhibit V, called for the removal of approximately 250,000 cubic yards and, in point of fact, 250,010 cubic yards were removed. It was the oral understanding of the parties that removal would be made at an even rate, and for that reason the Draying Company was willing to make payment substantially in advance of the rate of removal in order to permit Petitioners to meet their commitments to the bank which they had made in reliance on the oral understanding (R. pp. 60-61). The willingness of the Draying Company to make payments to the bank at a uniform rate, regardless of the sand removed, would seem to go far toward establishing that the agreement for payment in this case was in the nature of a personal covenant on the part of the

Draying Company. *Helvering v. Elbe Oil Land Co.*, 202 U.S. 372, 375 (1938). Moreover, since the payment to Petitioners might have derived from a sale of the fee rather than a sale of the minerals, there is a considerable resemblance to the situation in *Ander-son v. Helvering*, 310 U.S. 404 (1940), and the reasoning of the Supreme Court in that case, in reaching the conclusion that no economic interest had been retained, would seem to be applicable here.

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## II. NO ECONOMIC INTEREST WAS RETAINED BY PETITIONERS UNDER THE 1950 AGREEMENT.

Under the agreement of May 19, 1950 (Ex. XII), the fact that Petitioners retained no economic interest in the sand is virtually indisputable. That agreement provided:

“WHEREAS, the Buyer and the Sellers made and executed a certain agreement dated September 4, 1945, unrecorded, hereinafter called ‘sand agreement’, in which agreement the Buyer was given the right and has agreed to take approximately 250,000 cubic yards of black sand from a 4.433 acre area known as the Sand Area, being a portion of Lots 822 and 824 of the Makiki Round Top lots, Honolulu, T. H., being also a certain portion of L. P. Grants 11315 and 6815, area 4.433 acres, as more particularly described in a certain mortgage made by the Sellers to Bishop National Bank of Hawaii at Honolulu, dated August 21, 1947, recorded in the Hawaiian Registry of Conveyances in Book 2064, page 116, owned by the Sellers; and

WHEREAS, under said agreement the Buyer is authorized and is hereby authorized to enter upon and to take and remove therefrom black sand on payment of a royalty of forty cents (40¢) per cubic yard for black sand so removed, and is obligated to construct certain improvements on the said lands after removal of the black sand; and

WHEREAS, the said sand agreement as amended (by unrecorded amendment) provides for removal of the black sand and completion of certain improvements on or before July 1, 1951; and

WHEREAS, it has become essential in the interests of the Buyer's business and necessary to its business program in connection with its use of black sand that the Buyer have an extension of one year within which to exercise its rights, take black sand and to complete construction of the improvements provided for in the said sand agreement; and

WHEREAS, the Buyer still has the right and obligation to remove approximately 133,000 cubic yards of black sand upon royalty payment of forty cents (40¢) per cubic yard; and

WHEREAS, the Sellers desire to obtain a loan from the Bishop National Bank of Hawaii at Honolulu, hereinafter referred to as the 'Bank', in the amount of Forty-Eight Thousand Nine Hundred Sixty Dollars (\$48,960.00); and

WHEREAS, the Sellers are willing to grant an extension of one year to enable the Buyer to exercise its rights and perform its obligations

under the sand agreement upon the following terms and conditions;

NOW THEREFORE, in consideration of the premises and of ONE DOLLAR (\$1.00) each to the other paid, the receipt whereof is hereby acknowledged, and of the terms and agreements on the part of the Buyer and Sellers hereinafter set forth to be observed and performed, the Buyer and the Sellers do hereby mutually agree that the above mentioned sand agreement dated September 4, 1945, be and the same is hereby amended on the following terms and conditions:

(a) The time for completion of the provisions of the said sand agreement is hereby further extended for one year from July 1, 1951, to and including July 1, 1952;

(b) The Sellers will execute and deliver to the Bank their joint and several promissory note dated May 19, 1950, in the principal amount of \$48,960.00 payable on demand after date with interest at the rate of three per cent (3%) per annum payable monthly on diminishing balances of principal, which note shall be endorsed by the Buyer;

(c) As further consideration for the one year extension, Buyer agrees to pay the interest on the unpaid balance of principal of said note accruing after the 19th day of May, 1950, and real property taxes attributable to the said 4.433 acre sand area for the period May 1, 1950 to June 30, 1952;

(d) Commencing June 20, 1950, all royalty payments for black sand removed from said 4.433 acre sand area are hereby irrevocably assigned



to the Bank as security for the repayment of said note and shall be made by the Buyer to the Bank at the rate of \$2,040.00 per month and applied by the Bank on principal against the above mentioned note; and upon payment in full of said note all further payments of royalty shall be made to the Sellers;

(e) The Buyer will perform the Sellers' obligations to Yoshido H. Eguchi and Richard Fusao Hasegawa as set forth in a certain agreement between them and the Sellers dated the 1st day of July, 1946, recorded in Book 2091, page 44 in said Registry unless time for performance thereof is extended by agreement with said Yoshido H. Eguchi and Richard Fusao Hasegawa;

This agreement shall be binding on the parties hereto and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate the day and year first above written."

It will not do for Respondent to argue (Br. pp. 18, 19) that in so far as the taxpayers were concerned, they continued to be paid on the basis of production under this amended agreement, for this simply was not the case. Under the amended agreement, the taxpayers were to receive at once, through the device of a loan from the bank guaranteed by the Draying Company to be repaid by the Draying Company, the sum of \$48,960. This was the equivalent of 40¢ per cubic yard on approximately 12/13ths of the sand still to be removed. The Draying Company under-

took to pay off the loan at the rate of \$2,040 per month, regardless of production; to pay interest at the rate of 3% per annum on the balance of the loan; and to pay the real property taxes on the property during the period of the agreement. Obviously any argument that Petitioners' possibility of profit under the amended agreement was dependent *solely* upon the extraction of the mineral is completely untenable. Moreover, it cannot be doubted that the Draying Company's obligation under the amended agreement was a personal covenant.

---

### III. RESPONDENT'S OTHER CONTENTIONS.

Respondent purports to rely (Br. p. 14) upon the decision of this court in *Usibelli v. Commissioner of Internal Revenue*, 229 F. 2d 539 (9th Cir. 1955), where this court reviewed at some length the various cases involving this question, particularly where coal deposits were at issue. As this court pointed out in that case, the question of whether a party to a mineral agreement has an economic interest in the minerals is one of difficulty, and various tests have been applied at various courts. This court stated:

"Prime among these tests is whether the extractor looks for his compensation to the severance and sale of the mineral or whether his compensation is dependent upon the personal covenant of those with whom he has contracted." 229 F. 2d 544.

It is Petitioners' contention in the present case that under the 1945 agreement it was the intention of the

parties that the compensation of Petitioners should be dependent upon the personal covenant of the Draying Company. This intention is borne out by the statements of the parties and by their conduct in carrying out the agreement. With respect to the 1950 agreement, the fact that the compensation of Petitioners was dependent upon a personal covenant of the Draying Company is clear beyond dispute.

In the *Usibelli* case this court also pointed out that secondary factors included the amount of control which the contractor had over the amount and time of production and the disposal of surplus production, the length of the term of the contract, and whether or not the operator had the right to terminate the contract at will. As this court pointed out, a short-term contract terminable at will ordinarily vests no economic interest in the contractor, while a long-term fixed contract does vest such an interest. In this case the contract was for five years and the period was fixed. It was not terminable at will. These circumstances support the contention that no economic interest had been retained by Petitioners.

Respondent argues (Br. pp. 15, 16) that under the agreements the Draying Company would have no further right in the sand upon the termination of the period of limitation. We fail to find such a provision in either agreement. Moreover, this argument overlooks the fact that the agreements contemplated that, in addition to removing the sand, the Draying Company would do certain work on the land, leaving it in a condition fit for subdivision. Respondent states

(Br. p. 16) that taxpayers do not suggest what would happen to sand which was not removed and therefore the obligation to remove the sand was no more than the customary obligation to exploit a mineral lease. The answer to this is that the Draying Company had an obligation not only to remove the sand but to provide a right-of-way, put in a road, install other subdivision improvements and leave the land graded and ready for subdivision. In these circumstances, had the Draying Company failed to carry out its obligation to remove the sand, it would have been subject to a decree for specific performance compelling it to do so.

Respondent argues (Br. p. 16) that the presence of the condemnation clause in the 1945 agreement indicates the retention of an economic interest in the sand on the part of the sellers. Our answer is that the purpose of the condemnation clause was merely to provide a means of settling the rights of the parties in the event the agreement could not be carried out due to condemnation. It is true that such a clause is normally present in leases. It is equally true, as pointed out in Petitioners' opening brief (Br. pp. 18, 19) that many of the other clauses normally found in leases are not here present. Examples of these are covenants with regard to strip or waste, fencing, insurance, repair, right of entry for purposes of inspection, approval of plans for improvements, forfeiture, and maintenance of the premises in a clean and sanitary condition.

Respondent argues (Br. p. 17) that there was no provision for the Draying Company to pay taxes on the property which it is now asserted belongs to that company. We do not know just what taxes Respondent is referring to. There is no personal property tax in Hawaii, and as to the real property tax, the owner of the fee under the Hawaiian statutes is charged with the whole, regardless of what other interests there may be in the realty in question. Moreover, the statement that Petitioners paid the taxes themselves for all the years from 1946 through 1952, with a reference to Record pages 143-144, overlooks the fact that further along, on page 144, it was testified that pursuant to the 1950 agreement (Ex. XII) the Draying Company refunded to Petitioners the taxes from the date of that agreement until its expiration.

Respondent states that the expense of constructing the house on Lot 822 was treated as advance royalties rather than as a portion of a total purchase price (Br. p. 17), and then argues that this expense might be held to qualify as an initial payment (Br. p. 20).

Respondent criticizes the taxpayers (Br. p. 18) for attaching significance to the fact that payments were made in advance of sand actually removed, pointing out that in *Kittle v. Commissioner*, 21 T.C. 79, aff'd. 229 F. 2d 313 (9th Cir. 1956), advance or minimum payments were held to be consistent with the lease. The court below, however, based its decision upon *Crowell Land & Mineral Corp.*, 25 T.C. 223, which stated that "payment for deposits only as removed

and retention (or retransfer) of title to the balance are typical indicia of the existence of an economic interest." For this reason, the fact that in this case payments were not tied to removal is significant.

In both *Helvering v. Elbe Oil Land Co.*, 303 U.S. 372 (1938), and *Arthur N. Trembley v. Commissioner*, 1948 T.C. Mem. Dec. P-H, Vol. 17, par. 47,270, considerable weight was given by the courts to the factor of a large initial payment. In the present case it is therefore of some significance that in carrying out the 1945 contract a large advance payment in the form of a house costing in excess of \$19,000 was made before production commenced, while under the 1950 contract Petitioners received 12/13ths of the total consideration at the outset and before the materials were removed. Respondent summarizes what he states to be the characteristics of this contract and which he states are common with the usual mineral lease. Among the characteristics he sets forth are the following:

- (1) Payment was to be made only as the sand was removed and at a rate fixed by the removal.

This is simply not true. It was not contemplated by the parties that payment was to be made only as the sand was removed, and payment was not so made in practice. Under the original agreement, over \$19,000 was paid in the form of the construction of a home before there was any removal, and thereafter payments were made at the rate of \$1,050 per month re-

gardless of the rate of removal. Under the amended contract, \$48,960 was paid at the outset through the device of a bank loan, and the Draying Company obligated itself to repay this loan to the bank at the fixed rate of \$2,040 per month regardless of the amount of sand removed.

- (2) There was an obligation to exploit derived from the time limit with all rights to revert to the owner of the fee at the expiration of that time limit.

This again is simply not true. No such provision appears in either agreement. As we have pointed out, the agreements contemplated not only removal but other work on the land to render it fit for subdivision. Obviously there could not be any reversion of the sand involved in such a situation.

- (3) The owners continued to pay all taxes on the entire property.

This again is incorrect. Under the 1950 agreement the obligation for the payment of taxes fell upon the Draying Company.

- (4) There was no lump sum payment either made or agreed upon.

This again is not correct. The house was constructed in 1946 in advance of any removal. It was in fact a lump sum payment. Under the 1950 agreement \$48,960 was obtained at the outset by the Petitioners from the bank as a result of the agreement of the parties.

- (5) Draying Company was not obligated to pay in all events any fixed total amount of any fixed installments.

This is not correct. Draying Company had an understanding that it would keep the payments uniform under the original agreement. Consequently, it assumed the obligation to make payments of \$1,050 a month to the bank, regardless of production, from May of 1948 until the amended agreement was signed in 1950. It thereafter obligated itself in writing to make a payment of \$2,040 per month to the bank, regardless of production.

- (6) There was no deed of conveyance.

The answer to this is that no such instrument was necessary to accomplish the ends of the parties in question. The two agreements were sufficient, not only for the parties themselves but for the bank to make loans upon, as is borne out by the fact that such loans were made.

- (7) There was no fixed description of the property, Draying Company being permitted to take nearly 100,000 of the 250,000 yards from below the level and to reject an equal amount of material from above the grade level.

Respondent apparently overlooks the fact that the agreement fixed the amount of black sand to be taken at approximately 250,000 yards, and that the grade levels to be established had also been fixed at that



time by obtaining preliminary approval of the subdivision from the City Planning Commission. When, in the course of excavation, it was discovered that not all of the material within the slice out of the mountain which was to be taken was black sand, naturally enough Draying Company took a small amount of black sand below the grade level and then filled the resulting hole with the unusable material quarried above the grade level.

The statement that there was no fixed description of the property to be taken is not in accord with the facts, since the property to be taken was described as approximately 250,000 cubic yards of black sand. The statement that approximately 100,000 cubic yards was taken below grade level is not borne out by the testimony. Mr. Bush testified (R. p. 102) that the hole which was dug was approximately 40 feet wide, 150 feet long and 70 feet deep. Such an excavation would contain 420,000 cubic feet, or approximately 15,556 cubic yards of material. Compared to the 250,010 cubic yards removed, this amount is certainly not substantial.

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#### IV. PETITIONERS' ADDITIONAL CLAIM FOR A REFUND.

Lastly, Respondent argues that if Petitioners' additional claim for a refund is to be passed upon, a remand to the Tax Court is necessary (Br. p. 19). The question to be decided on this phase of the case is whether or not Petitioners received an initial payment upon the sale of the sand in question. If the sale was

consummated in 1945, they obviously did not. If, on the other hand, the sale was consummated when Petitioners obtained title to Lot 822 in 1946, the question is whether the building of the house by the Draying Company constituted an initial payment.

In contrast to his earlier argument that the payment by way of construction of the house was not an initial payment at all but merely an advance on royalties, Respondent argues (Br. p. 20) that it was an initial payment.

Petitioners submit their argument on this point in their opening brief was correct and that the record herein is sufficient to permit this court to decide the issue. They have, however, no objection to a remand if the court deems it necessary.

---

#### CONCLUSION.

For the reasons set forth above and in Petitioners' opening brief, it is respectfully submitted that the judgment of the Tax Court should be reversed and an order entered giving judgment in favor of Petitioners as prayed in their petition before the Tax Court.

Dated, Honolulu, Hawaii,  
March 11, 1957.

Respectfully submitted,

FRANK D. PADGETT,

*Attorney for Petitioners.*

ROBERTSON, CASTLE & ANTHONY,  
*Of Counsel.*

No. 15248

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United States  
Court of Appeals  
for the Ninth Circuit

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EMIL WENTZ and WILLIAM BERING JEN-  
SEN, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California,  
Central Division

FILED

DEC - 3 1956

PAUL P. O'BRIEN, CLERK



No. 15248

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## NAMES AND ADDRESSES OF ATTORNEYS

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U. S. Attorney,

LOUIS LEE ABBOTT,  
Asst. U. S. Attorney,  
Chief, Criminal Division,  
600 Federal Building,  
Los Angeles 12, California. [1]\*

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\* Page numbers appearing at foot of page of original Transcript of Record.



United States District Court for the Southern  
District of California, Central Division

February, 1956, Grand Jury

No. 24950 CD

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL VICTOR SCHLISING, EMIL  
WENTZ, and WILLIAM BERING JEN-  
SEN, Defendants.

INDICTMENT

[U.S.C., Title 18, Sec. 1343—Fraud by interstate  
and foreign wire]

The grand jury charges:

From on or about the 14th day of November, 1955, and continuing to on or about the 29th day of November, 1955, the defendants Michael Victor Schlising, Emil Wentz and William Bering Jensen devised, and intended to devise, a scheme and artifice to defraud Frank X. Pommer and Selma H. Pommer and to obtain money from the said Frank X. Pommer and Selma H. Pommer by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the name of the

defendant Michael Victor Schlising was Karl Ober; that the name of the defendant Emil Wentz was James E. Walters; that an organization known as the Metropolitan Company owned all of the horses running at race tracks; that the defendant Emil Wentz was employed by the said Metropolitan Company as "confidence man" engaged in betting money on "fixed" horse races; that the defendant Emil Wentz was using confidential information received by him from the said Metropolitan Company to make bets on fixed horse [2] races for his own account; that the defendant Emil Wentz would pay to the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising 25% of moneys won by him from bets so made if the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising would place the said bets for him; that the surname of the defendant William Bering Jensen was Johansen; that the defendant William Bering Jensen was president of the American Club, Mexico, District Federal, Republic of Mexico, for a period of time including November 19 through November 24, 1955; that the said American Club was engaged in the business of accepting wagers on horse races; that the defendant Emil Wentz had, on November 19, 1955, made a bet on a horse race with the American Club in the sum of \$101,500, consisting of \$1,500 in cash and a check for \$100,000; that as a result of the said bet the defendant Emil Wentz had won \$203,000; that the defendant William Bering Jensen, as president of the said Ameri-

can Club, would pay \$200,000 of its funds to the defendant Emil Wentz on condition that the defendant Emil Wentz show to the defendant William Bering Jensen \$100,000 in cash as evidence that the said check in the amount of \$100,000 would have been collectible if the wager in which it was used had been lost by the defendant Emil Wentz; that if the said Frank X. Pommer and Selma H. Pommer would advance \$24,000 in cash to be displayed to the defendant William Bering Jensen in combination with \$76,000 in cash to be furnished by defendants Michael Victor Schlising and Emil Wentz, said \$24,000 would immediately thereafter be returned to the said Frank X. Pommer and Selma H. Pommer, together with an additional \$25,000; that the defendant Michael Victor Schlising had displayed \$100,000 to the defendant William Bering Jensen, and had received from the defendant William Bering Jensen an additional \$200,000 in cash to be delivered to the defendant Emil Wentz; that the defendant Michael Victor Schlising thereafter bet and lost \$200,000 [3] purportedly delivered by the defendant William Bering Jensen to him and all of the money purportedly displayed to the defendant William Bering Jensen, including the said \$24,000 in cash delivered to the defendant Emil Wentz by the said Frank X. Pommer and Selma H. Pommer; and

On or about November 22, 1955 defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen, for the purpose of executing the aforesaid scheme and artifice, caused to be

transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico.

A True Bill.

/s/ GEORGE DIETZLER,  
Foreman.

/s/ LAUGHLIN E. WATERS,  
United States Attorney.

[Endorsed]: Filed April 25, 1956. [4]

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United States District Court, Southern District  
of California, Central Division

No. 24,950 Criminal

MINUTES OF THE COURT

Date: May 1, 1956. At: Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Wm. C. Mathes, District Judge;  
Deputy Clerk: L. B. Figg; Reporter: J. D. Ambrose; U. S. Attorney, by Assistant U. S. Attorney Louis L. Abbott; Counsel for Defendants: A. D. McEachen.



Defendants present (on O/R) (on bond in Case No. 24,808-Cr.).

Proceedings: For arraignment and plea.

Defendants are arraigned and each defendant states his true name is as set forth in the Indictment and pleads not guilty to offense charged therein, without prejudice to defendants' rights to make motions as to this Indictment.

It Is Ordered that cause is set for jury trial 10 a.m., May 22, 1956, and it is stipulated and ordered that motions to be made by defendants may be filed not later than May 9, 1956, and may be noticed for hearing at 2 p.m., May 14, 1956.

JOHN A. CHILDRESS,  
Clerk,

/s/ By L. B. FIGG,  
Deputy Clerk. [5]

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[Title of District Court and Cause.]

MOTION TO DISMISS  
(Rules 7C, 12 Fed. Rules Crim. Proc.)

The indictment does not state an offense against the laws of the United States.

Title 18 of Section 1343 U. S. Code—Fraud by Wire: “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or

fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined, etc. \* \* \*

The afore cited section is otherwise known as Section 18 (a) of the Communications Act Amendments, 1952, 66 Stat. 722. These Amendments are to the Communications Act of 1934 found in Title 47 of the U. S. Code. Section 153 of the Communications Act, 1934 Title 47 U. S. Code 153 is as follows:

Definitions (e): "Interstate communication or interstate transmission means, communication or transmission: (1) from any state, territory or possession of the United States \* \* \* to any other [6] State, territory or possession of the United States \* \* \* (f) Foreign communication or foreign transmission means communication or transmission from or to any place in the United States to or from a foreign country."

The indictment recites in part as follows: "On or about November 22, 1955 defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen, for the purposes of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence

to Mexico, District Federal, Republic of Mexico.”

In *Border Pipe Lining Co. v. Federal Power Commission*, 171 Fed. 2nd, 149 (1948) there was a petition to review an order of the Federal Power Commission. The petitioners were exporters of natural gas to Mexico under permit from the Federal Power Commission. Petitioners output of natural gas went to an industrial consumer who transported the gas to Mexico and used it there. Petitioners had complied with the export requirements of the Act, but not the interstate requirements. The question before the court was whether or not petitioners were engaged in interstate commerce within the provisions of the Natural Gas Act. Setting aside the order, the court held that petitioners were not engaged in interstate commerce within the provisions of the Act. In so doing the court stated as follows: “Interstate commerce does not include foreign commerce, unless Congress by definition for the purpose of a particular statute includes them both in a single expression.” Page 150 of the opinion sets out examples of the various definitions outlined by Congress. “The prime responsibility for making statutory meaning clear is on the Congress. It is bad for the court to twist strange results out of otherwise understood expressions of the legislature.” [7]

In *Powell vs. U. S.*, 112, Fed. 2nd 764, 4th Circuit 1940, the defendants were indicted for failure to observe their published tariffs under the Elkins Act, 49 U. S. Code 41. In this case it was argued by the Government that the shipment was not in

foreign commerce. The shipping order involved showed on its face "for export", the Court at Page 767 of the Opinion stated: "There can be no question but that the shipment was intended at its inception as a movement in foreign commerce \* \* \* There was an original and continuing intention on the part of those having control of the shipment that unless rejected, it should proceed to a foreign destination and this, we think, was determinative of its character."

The defendants are charged with transmission by interstate and foreign wire a signal and sound from Los Angeles, California through points in Texas to Mexico.

The language used imparts continuity. It is obvious that there is but one message and that message originated at Los Angeles and was from the outset a foreign message to Mexico. As such it was not within the statute. The expression "thence" imparts continuity, that the following course is continuous with the one before it.

Flagg v. Mason, 141 Mass. 66, 6 N. E. 702.

It is respectfully submitted that the indictment should be dismissed.

/s/ ANGUS D. McEACHEN,  
Attorney for Defendants. [8]

Acknowledgment of Service Attached. [9]

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

**MOTION UNDER RULE 7 F (FEDERAL  
RULES—CRIMINAL PROCEDURE FOR  
BILL OF PARTICULARS)**

The defendants, and each of them, move for a Bill of Particulars in the above entitled cause as follows:

**I.**

The full context of the signal and sound transmitted by means of interstate and foreign wire as alleged on Page 3 of the indictment, last paragraph thereof, including the identity of the sender or senders of the sound and signal and the exact date when the signal and sound was transmitted, the person or persons to whom the signal and sound was transmitted, the destination of said signal and sound as indicated at the point of origin.

**II.**

How and in what manner the defendants, and each of them, caused said signal and sound to be transmitted by interstate and foreign wire as alleged on Page 3 of the indictment, Lines 8 and 9.

/s/ ANGUS D. McEACHEN

Attorney for Defendants [10]

**Points and Authorities**

**Rule 7 F Federal Rules—Criminal Procedure.**

The purpose of a Bill of Particulars is to define

more specifically the offense charged and to inform the defendants precisely of the offense.

U. S. v. Mangiaracina, 10 F.R.D. 415, W. D. Mo.

A Bill of Particulars must be specifically precise to enable the defendants to prepare for trial and not to be surprised.

Norris v. U. S., 152 Fed. 2nd, 808; Cert. Den. 328 U. S. 850. [11]

Acknowledgment of Service Attached. [12]

[Endorsed]: Filed May 9, 1956.

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United States District Court  
Southern District of California  
Central Division

No. 24,950—Criminal

MINUTES OF THE COURT

Date: May 14, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Wm. C. Mathes, District Judge;

Deputy Clerk: Louis Cunliffe; Reporter: Don P. Cram; U. S. Att'y., by Ass't. U. S. Att'y. Louis L. Abbott; Counsel for Defendants: A. D. McEachen.

Defendants not present.

Proceedings: For hearing on (1) motion of defendants to dismiss the Indictment, filed May 8, 1956, and (2) motion of defendants for bill of particulars, filed May 9, 1956.

Attorney McEachen, for defendants, makes a statement.

Attorney Abbott, for Gov't., makes a statement.

J. E. Meaney, witness for defendants, is called, sworn, and testifies over objections of U. S. Attorney.

Both sides stipulate that telegram to which Witness Meaney testifies is the one mentioned in the Indictment.

Said telegram is read into the record.

Court orders both motions of defendant (1) to dismiss the Indictment, and (2) for bill of particulars, denied; counsel for Gov't. to prepare formal order.

It is ordered that this cause be transferred to Judge Harrison for trial with Case No. 24,808-Cr.

It is ordered that trial date of May 22, 1956, is vacated. [13]

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[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS  
AND MOTION UNDER RULE 7 F (FED-  
ERAL RULES CRIMINAL PROCEDURE  
FOR BILL OF PARTICULARS)

The Motion to Dismiss, filed May 8, 1956, and the Motion under Rule 7 F (Federal Rules of Criminal Procedure for Bill of Particulars), filed May 9, 1956, having come on for hearing on May 14,

1956, the plaintiff appearing through Laughlin E. Waters, United States Attorney, by Louis Lee Abbott, Assistant United States Attorney, the defendants appearing through their counsel, Angus D. McEachen; oral evidence having been taken at the request of the said defendants, and certain Stipulations having been effected by the parties, and the Court being fully advised in the premises;

It is hereby ordered that the Motion to Dismiss, filed May 8, 1956, be and it is hereby denied;

It is further ordered that the Motion under Rule 7 F (Federal Rules Criminal Procedure for Bill of Particulars), filed May 9, 1956, [14] be and it is hereby denied.

Dated: This 14th day of May, 1956.

/s/ WM. C. MATHES

United States District Judge

Approved as to form:

/s/ ANGUS C. McEACHEN

Attorney for Defendants

LAUGHLIN E. WATERS

United States Attorney

/s/ LOUIS LEE ABBOTT

Assistant U. S. Attorney,  
Chief, Criminal Division

Attorneys for Plaintiff. [15]

[Endorsed]: Filed May 18, 1956.



[Title of District Court and Cause.]

**MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OVER DEFENDANTS, MICHAEL VICTOR SCHLISING AND WILLIAM BERING JENSEN (Federal Rules of Criminal Procedure 12b(2) ).**

The defendants, Michael Victor Schlising and William Bering Jensen, move that the indictment be dismissed on the following grounds:

1. The Court is without jurisdiction over the person of each of them for the reason that they had been illegally abducted by Mexican authorities at their place of residence in Mexico City, Republic of Mexico and taken across the border of the United States at Laredo, Texas, and then and there delivered into the immediate custody of agents of the United States Government as indicated by the affidavits attached to this motion and made a part hereof.

/s/ ANGUS D. McEACHEN

Attorney for Defendants. [16]

Points and Authorities

Federal Rules of Criminal Procedure, Rule 12b (2).

United States v. Rosenberg, 195 F. 2nd 1583; Cert. Den. 344 U. S. 889.

There is an analogy here to the requirement that a confession must be voluntary to be admissible.

McNabb v. U. S., 318 U. S. 332, also

In re: Fried, 161 Fed. Md. 453; Cert. Den. 331 U. S. 858.

Here the Court passed on the propriety of a motion to suppress an involuntary confession.

Fifth Amendment, United States Constitution.

[Title of District Court and Cause.]

AFFIDAVIT OF MICHAEL VICTOR  
SCHLISING

State of California,  
County of Los Angeles—ss.

Michael Victor Schlising, being by me first duly sworn, deposes and says: that he was a resident of Mexico City, Republic of Mexico during the month of January, 1956; that on the 17th day of January, 1956, affiant was taken into custody by Mexican authorities and detained; that although numerous requests were made by him that he be permitted to talk to an attorney, said requests were denied; that no proceedings whatsoever were had in Mexico City in connection with affiant's detention; that thereafter affiant was transported by automobile from Mexico City through Nueva, Laredo, Mexico, across the border between United States and Mexico where at Laredo, Texas affiant was immediately delivered into the hands of certain agents of the United

States Government; affiant further states that at no time during this period was he permitted to confer with a [18] lawyer or anyone else with respect to the aforesaid detention; that subsequent thereto affiant was taken in custody to the office of the United States Commissioner at Laredo, Texas, at which time he was arraigned on the indictment herein.

/s/ M. V. SCHLISING

Subscribed and sworn to before me this 17th day of May, 1956.

[Seal] /s/ JANE A. MELCHER,

Notary Public in and for the County of Los Angeles, State of California. [19]

[Title of District Court and Cause.]

## AFFIDAVIT OF WILLIAM BERING JENSEN

State of California,  
County of Los Angeles—ss.

William Bering Jensen, being first duly sworn, deposes and says: that during the month of January, 1956, this affiant was a resident of Mexico City, Republic of Mexico; that on the 17th day of January, 1956, affiant was taken into custody by Mexican authorities and detained; that although numerous requests were made by affiant that he be permitted to talk to an attorney, said requests were denied; that no proceedings whatsoever were had in Mexico

City in connection with affiant's detention and that thereafter affiant was transported by automobile from Mexico City through Nuevo, Laredo, Mexico, across the border between the United States and Mexico where at Laredo, Texas affiant was immediately delivered into the hands of certain agents of the United States Government; affiant further states that at no time during this period was he permitted to confer with a lawyer or anyone else with respect to [20] the aforesaid detention; that subsequent thereto affiant was taken in custody to the office of the United States Commissioner at Laredo, Texas, at which time he was arraigned on the indictment herein.

/s/ WM. B. JENSEN

Subscribed and sworn to before me this 17th day of May, 1956.

[Seal] /s/ JANE A. MELCHER,

Notary Public in and for the County of Los Angeles, State of California. [21]

Acknowledgment of Service Attached.

[Endorsed]: Filed May 18, 1956. [22]

United States District Court  
Southern District of California,  
Central Division

No. 24,950—Criminal

MINUTES OF THE COURT

Date: May 21, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Ben Harrison, District Judge;

Deputy Clerk: L. B. Figg; Reporter: J. D. Ambrose; U. S. Att'y., by Ass't. U. S. Att'y. Louis Lee Abbott; Counsel for Defendants: A. D. McEachen and Al Matthews.

Defendants present (on O/R) (on bond in Case No. 24,808-Cr.).

Proceedings: For (A) hearing motion of defendants Michael Victor Schlising and William Bering Jensen, filed May 18, 1956, to dismiss the Indictment for lack of personal jurisdiction over said defendants; and (B) jury trial as to all defendants.

Court convenes in Chambers at 2 P.M. Counsel are present. Defendants are not present. Attorney McEachen states that Attorney Al Matthews is associated as co-counsel for defendants.

Counsel make statements.

Court makes a statement and It Is Ordered that the motion of Defendants Schlising and Jensen to

dismiss the Indictment for lack of personal jurisdiction over said defendants is denied without prejudice to renewal of the matter and reconsideration on motion of defendants in the event of a verdict of guilty.

Court recesses: Court reconvenes in the courtroom at 2:15 P.M. Counsel are present as before. Defendants Wentz and Jensen are present, but defendant Schlising is not present.

It Is Ordered that a bench warrant be issued for the apprehension of Def't. Schlising and new bail is fixed for said defendant in the sum of \$25,000.

Counsel and the Court make statements relative to Def't. Schlising's absence. It is stipulated by counsel for defendants that the case may proceed as to the selection of the jury and opening statements made in the absence of Def't. Schlising, and it is so ordered. It is also ordered that the order for issuance of a bench warrant and new bail for Def't. Schlising is vacated.

It is ordered that a jury be impaneled and trial proceed.

The following jurors, duly impaneled, are sworn to try this cause:

- |                        |                        |
|------------------------|------------------------|
| 1. Madrienne M. Heinz  | 7. Evelyn L. Kridler   |
| 2. Patrick J. Costello | 8. Emson L. Knorr      |
| 3. Margaret E. Best    | 9. Zelick Holzman      |
| 4. Geraldine D. Harris | 10. Scott Metcalf, Sr. |
| 5. Virginia C. Mason   | 11. Lin F. Spenzer     |
| 6. Fred B. Spencer     | 12. Leslie H. Burke    |

Alternate Juror: Frederick H. Chapman.

The Court read the Indictment to the prospective jurors prior to their impanelment. At 3 P.M. Court admonishes the jurors not to discuss this cause and declares a recess. At 3:10 P.M. Court reconvenes herein, and Def'ts. Wentz and Jensen, the jury and alternate juror, and counsel being present, Def't. Schlising is not present, trial proceeds.

Attorney Abbott makes opening statement for the Gov't.

At 3:35 P.M. Court admonishes the jurors not to discuss this cause and Orders cause continued to 9:30 A.M., May 22, 1956, for further jury trial.

JOHN A. CHILDRESS,  
Clerk,

/s/ By L. B. FIGG,  
Deputy Clerk. [23]

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United States District Court  
Southern District of California,  
Central Division

No. 24,950—Criminal

## MINUTES OF THE COURT

Date: May 22, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Ben Harrison, District Judge;  
Deputy Clerk: L. B. Figg; Reporter: J. D.

Ambrose; U. S. Att'y., by Ass't. U. S. Att'y. Louis Lee Abbott; Counsel for Defendants: A. D. McEachen and Al Matthews.

Defendants Wentz and Jensen present (on O/R) (on bond in Case No. 24,808-Cr.).

Proceedings: For further jury trial.

At 9:35 A.M. court convenes in Chambers. Counsel are present. Defendants are not present. Counsel and Court make statements relative to the fact that def't. Michael Victor Schlising is not present. Counsel for said defendant state that the trial may proceed in the absence of said defendant for the time being.

At 9:45 A.M. court convenes in the courtroom, and defendants Wentz and Jensen, counsel for both sides, and the jury being present, Def't. Schlising is absent, Court orders trial proceed.

Selma Pommer, witness for Gov't., is called, sworn, and testifies.

At 10:05 A.M. Court announces that it appears that Def't. Schlising is not yet present and inquires if counsel for said defendant wish to continue to proceed with the taking of evidence for a further reasonable time, and it is so stipulated and ordered.

Witness Pommer resumes her testimony.

Gov't. Ex. 1, 2, 3, and 4 are marked for ident.

At 11 A.M. Court admonishes the jury not to discuss this cause and excuses the jury for recess, and the jury leave the courtroom.

It is stipulated and ordered that the trial of



Def't. Schlising be severed from the other defendants and trial vacated as to Def't. Schlising, and that the trial proceed as to Defendants Wentz and Jensen.

It Is Ordered that a bench warrant issue for the apprehension of Def't. Schlising, as the said defendant is still not present. Court Orders bail of Def't. Schlising fixed in the sum of \$25,000.

At 11:05 A.M. Court recesses. At 11:12 A.M. Court reconvenes herein, and all being present as before, including Defendants Wentz and Jensen, counsel for both sides, and the jury, Court orders trial proceed.

Witness Pommer is recalled and testifies further.

Gov't. Ex. 1 to 5 incl. are admitted in evidence, and Ex. 6 is marked for ident.

At noon Court reminds the jury of the admonition heretofore given and declares a recess to 1:30 P.M. At 1:30 P.M. court reconvenes herein, and all being present as before, including both of the said defendants now before the Court, counsel for both sides, and the jury, Court orders trial proceed.

Gov't. Ex. 7 and 7-A are marked for ident.

Roscoe Bradley Gaither and Mrs. E. C. Thaden, respectively, witnesses for Gov't., are called, sworn, and testify.

Gov't. Ex. 8, 8-A, 9, and 10 are marked for ident.

At 2:55 P.M. Court reminds the jury of the admonition heretofore given and declares a recess. At 3:05 P.M. court reconvenes herein, and all being present as before, including both of the said defend-

ants now before the Court, counsel for both sides, and the jury, Court orders trial proceed.

Manuel Liodas, witness for Gov't., is called, sworn, and testifies.

Plf's. Ex. 8 and 8-A are admitted in evidence.

J. E. Meaney, witness for Gov't. is called, sworn, and testifies.

Gov't. Ex. 11 is admitted in evid.

At 4 P.M. Court admonishes the jury not to discuss this cause and orders cause continued to 9:30 A.M., May 23, 1956, for further jury trial.

JOHN A. CHILDRESS,  
Clerk,

/s/ L. B. FIGG,  
Deputy Clerk. [24]

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United States District Court  
Southern District of California  
Central Division

No. 24,950 Criminal

### MINUTES OF THE COURT

Date: May 23, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Ben Harrison, District Judge.

Deputy Clerk: L. B. Figg; Reporter: J. D. Ambrose; U. S. Att'y, by Ass't U. S. Att'y Louis

Lee Abbott; Counsel for Defendants: A. D. McEachen and Al Matthews.

Defendants Wentz and Jensen present (on O/R) (On bond in Case No. 24,808-Cr.).

Proceedings: For further jury trial as to Def'ts Wentz and Jensen. Jury is present. Court orders trial proceed.

E. C. Thaden, and M. G. McGee, respectively, witnesses for Gov't, are called, sworn, and testify.

Gov't Ex. 12, 5, 6, 7, 7-A, 9, and 10 are admitted in evidence.

Gov't rests. Each defendant, out of hearing of the jury, moves for judgment of acquittal and Court orders said motions denied. Defendants rest.

At 10:25 AM Court admonishes the jury not to discuss this cause and excuses the jury until 1:30 PM, and the jury leaves the courtroom.

Court recesses to the Court's Chambers for conference with counsel relative to instructions to the jury.

At 1:30 PM court reconvenes herein, and all being present as before, including both defendants now before the Court, counsel for both sides, and the jury, Court orders trial proceed.

Each defendant renews his motion for judgment of acquittal and Court orders said motions denied.

Attorney Abbott argues to the jury for the Gov't.

Attorney Matthews argues to the jury for defendants.

[Title of District Court and Cause.]

### VERDICT

We, the Jury in the above entitled cause, find the defendant, Emil Wentz, Guilty, as charged in the Indictment.

Dated: May 23, 1956.

/s/ SCOTT METCALF, SR.,

Foreman of the Jury [27]

[Endorsed]: Filed May 23, 1956.

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United States District Court  
Southern District of California  
Central Division

No. 24,950 Criminal

### MINUTES OF THE COURT

Date: May 25, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Ben Harrison, District Judge.

Deputy Clerk: L. B. Figg; Reporter: J. D. Ambrose; U. S. Att'y, by Ass't U. S. Att'y Louis Lee Abbott; Counsel for Defendants: A. D. McEachen.

Defendants Wentz and Jensen present (in custody).

Proceedings: For (a) hearing such motions as defendants Wentz and Jensen may file, and (b) sentencing of defendants Wentz and Jensen on offense charged in the Indictment (one count) (upon verdicts of guilty).

Defendants Wentz and Jensen file written motions in arrest of judgment and for new trial, and Attorney McEachen argues thereon to the Court for defendants.

Court Orders said motions denied.

Court pronounces judgment and Sentences each of defendants Emil Wentz and William Bering Jensen to imprisonment for the period of five years and fines each of said two defendants the sum of \$1,000. for offense charged in the Indictment.

Court states that if appeal is taken, it will admit defendants to bail.

JOHN A. CHILDRESS,

Clerk,

/s/ By L. B. FIGG,

Deputy Clerk

[28]

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[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT (RULE  
34, RULES OF CRIMINAL PROCEDURE.)

The defendants, Emil Wentz and William Bering Jensen, move the Court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States.
2. The Court is without jurisdiction over the person of defendant, William Bering Jensen.

/s/ ANGUS D. McEACHEN,

Attorney for Defendants [29]

## Points and Authorities

Rule 34, Rules of Criminal Procedure.

Authorities mentioned in Motion to Dismiss, and  
All authorities cited in Motion to Dismiss for  
Lack of Personal Jurisdiction. [30]

[Endorsed]: Filed May 25, 1956.

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[Title of District Court and Cause.]

## MOTION FOR NEW TRIAL

The defendants Emil Wentz and William Bering Jensen move the Court for a new trial for the following reasons:

1. The Court erred in denying defendants Emil Wentz and William Bering Jensen, motion for acquittal at the conclusion of the evidence.

2. The Court erred in charging the jury and in refusing to charge the jury as requested.

3. The verdict is not supported by substantial evidence.

4. The Court erred in admitting testimony of witness, Mrs. E. C. Thaden, to which objections were made.

Los Angeles, California, this 24th day of May, 1956.

/s/ ANGUS D. McEACHEN,

Attorney for Defendants [31]

## Points and Authorities

Rule 33, Rules of Criminal Procedure.

Authorities mentioned in Motion to Dismiss, on  
file herein. [32]

[Endorsed]: Filed May 25, 1956.

United States District Court for the Southern  
District of California, Central Division

No. 24950—Criminal

UNITED STATES OF AMERICA

v.

WILLIAM BERING JENSEN

JUDGMENT AND COMMITMENT

On this 25th day of May, 1956, came the attorney for the government and the defendant appeared in person and by counsel, A. D. McEachen and Al Matthews:

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of devising a scheme and artifice to defraud, and, for the purpose of executing said scheme and artifice, causing to be transmitted by means of interstate and foreign wire a signal and sound, in violation of 18 U. S. Code 1343; as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years, and that the defendant pay a

fine unto the United States of America in the sum of One Thousand Dollars (\$1,000.00).

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ BEN HARRISON,

United States District Judge [33]

[Endorsed]: Filed May 25, 1956.

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United States District Court for the Southern  
District of California, Central Division

No. 24950—Criminal

UNITED STATES OF AMERICA

v.

EMIL WENTZ

### JUDGMENT AND COMMITMENT

On this 25th day of May, 1956, came the attorney for the government and the defendant appeared in person and by counsel, A. D. McEachen and Al Matthews:

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of devising a scheme and artifice to defraud, and, for the purpose of executing said scheme and artifice, causing to be transmitted by means of interstate and foreign wire a signal and sound, in violation of 18 U. S. Code 1343; as



charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years, and that the defendant pay a fine unto the United States of America in the sum of One Thousand Dollars (\$1,000.00).

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ BEN HARRISON,

United States District Judge [34]

[Endorsed]: Filed May 25, 1956.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Name and address of appellants: Emil Wentz, 828 South Federal Highway, Lake Worth, Florida, and William Bering Jensen, 838 South Grand Avenue, Los Angeles, California.

Name and address of appellants' attorney: Angus D. McEachen, 510 S. Spring Street, Los Angeles, California.

Offense: 18 U. S. Code, 1343, Fraud by Interstate Wire.

Name of institution where now confined, if not on bail: Los Angeles County Jail.

Concise statement of judgment or order, giving date, and any sentence: 5/25/56: Each defendant sentenced to imprisonment for a period of five years and fined the sum of \$1,000.00. [35]

We, the above named appellants, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: May 25, 1956.

/s/ EMIL WENTZ,

/s/ WILLIAM BERING JENSEN,

Appellants

[36]

[Endorsed]: Filed May 25, 1956.

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[Title of District Court and Cause.]

### MOTION FOR BAIL PENDING APPEAL

Appellants, Emil Wentz and William Bering Jensen, in the above entitled cause, move the Court for an Order admitting them to bail pending the appeal by them from the Judgment of the United States District Court for the Southern District of California, Central Division imposing sentence on the said defendants, dated May 25th, 1956, for violation of 18 U. S. Code, 1343, Fraud by Interstate Wire.

Notice of Appeal was filed with the Clerk of the United States District Court, Southern District of California, Central Division, on May 25th, 1956.

This Appeal involves substantial questions which should be determined by the United States District Court of Appeals.

Dated: Los Angeles, California, May 25th, 1956.

/s/ ANGUS D. McEACHEN,

Attorney for Appellants, Emil  
Wentz and William Bering  
Jensen. [37]

Order Granting Foregoing Motion

Upon Motion of the above named Emil Wentz and William Bering Jensen, Appellants, and it appearing that Notice of Appeal from the United States District Court for the Southern District of California, Central Division, was filed on the 25th day of May, 1956, and that a substantial question is involved in this case which should be determined by the United States Court of Appeals,

It Is Hereby Ordered that Emil Wentz and William Bering Jensen be admitted to bail upon giving a bond in the sum of \$20,000.00 each pending their Appeal to the United States Court of Appeals.

Dated: Los Angeles, California, this 25th day of May, 1956.

/s/ BEN HARRISON,

Judge

[38]

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

### ORDER

Good cause appearing, the time for filing the record on Appeal and docketing the Appeal in the above entitled matter is extended to July 19th, 1956.

Dated: June 22, 1956.

/s/ BEN HARRISON,

Judge of the United States  
District Court

[39]

[Endorsed]: Filed June 22, 1956.

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[Title of District Court and Cause.]

### CONSENT TO LEAVE DISTRICT

Appellant, William Bering Jensen, is presently enlarged on bond pending his appeal in the above entitled cause.

Said bond restricts Appellant to the Southern District of California. Said restriction is modified as follows:

Pending the appeal herein, William Bering Jensen may depart the Southern District of California,

but may not depart the continental United States.

Dated: July 16, 1956.

/s/ BEN HARRISON,  
United States District Court

JOHN A. CHILDRESS,  
Clerk, U. S. District Court,  
Southern District of California

/s/ By H. L. COFFEY,  
Deputy

CONTINENTAL CASUALTY  
COMPANY,

[Seal] By (Illegible)  
Attorney-in-Fact [40]

[Endorsed]: Filed July 16, 1956.

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[Title of District Court and Cause.]

### ORDER

Good cause appearing, the time for filing the record on Appeal and docketing the Appeal in the above entitled matter is extended to August 20th, 1956.

Dated: July 16, 1956.

/s/ BEN HARRISON,  
Judge of the United States  
District Court [41]

[Endorsed]: Filed July 16, 1956.

4, 5, 6, 7, 7A, 8, 8A, 9, 10, 11, & 4 volumes of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 21st day of August, 1956.

[Seal]                      JOHN A. CHILDRESS,  
                                 Clerk,  
/s/ By CHARLES E. JONES,  
                                 Deputy

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In the United States District Court Southern  
District of California, Central Division

No. 24,950-CD

UNITED STATES OF AMERICA

Plaintiff,

vs.

MICHAEL VICTOR SCHLISING, EMIL  
WENTZ, and WILLIAM BERING JEN-  
SEN,                                      Defendants.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Honorable William C. Mathes, Judge Presiding  
Los Angeles, California, Monday, May 14, 1956.

Appearances: for the Plaintiff: Laughlin E.

Waters, United States Attorney; by Louis Lee Abbott, Assistant United States Attorney, Chief, Criminal Division. For the Defendants: Angus D. McEachen, Esq. 510 South Spring Street, Los Angeles 13, California. [1]\*

The Clerk: Case No. 24,950-Criminal, United States of America vs. Michael Victor Schlising, Emil Wentz and William Bering Jensen.

Mr. McEachen: Ready for the defendants. There is a waiver as to each and all defendants in this matter.

The Court: Is the Government satisfied with the waiver?

Mr. Abbott: I examined the file on Friday and found no waiver. It may have been filed since then.

Mr. McEachen: It was filed before that. And then I checked the docket and it indicated a filing.

Mr. Abbott: I examined it in the presence of the present clerk, who indicated there was none on file.

The Clerk: When did you file it, Mr. McEachen?

Mr. McEachen: It was filed on Wednesday.

Mr. Abbott: I am satisfied with counsel's representation that it was filed.

The Court: We will proceed upon Mr. McEachen's statement.

Mr. McEachen: All right, your Honor.

I have a representative of Western Union here. Would you come forward, please, and take the stand?

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\* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Mr. Abbott: I am going to object to the taking of any evidence at this time. [2]

The Court: What is this offered for, Mr. McEachen?

Mr. McEachen: This is offered, if your Honor please——

The Court: In support of what motion?

Mr. McEachen: Part of the motion to dismiss.

Mr. Abbott: The Government submits that such a motion is directed to the sufficiency of the indictment and no oral evidence could be properly admitted on any question raised by that motion.

Mr. McEachen: This is the situation, if your Honor please—and it has been passed upon by the Supreme Court in the case of *Edwards vs. United States*, 312 U. S. 473. And what we seek is the production of evidence which is the very foundation of our motion to dismiss.

The Court: What do you expect to prove by this witness?

Mr. McEachen: I expect to prove that a message was transmitted from the local office of the Western Union by one of the alleged victims here showing the destination of the particular communication at the point of origin, upon which my whole theory of this matter is predicated. In other words, it is my position, as represented in the motion to dismiss, that it is the message as it is reflected in the transmission at the point of origin which determines whether or not it is an interstate or foreign communication. Of course, if it is patent that it is a foreign communication then it is obviously out-



side of the statute. That is my [3] purpose; in other words, going right to the core of the case right here now.

The Court: What you are seeking to show is that it was a telegram sent from Los Angeles to Mexico City?

Mr. McEachen: That's right.

The Court: The Government alleges that it was transmitted by way of Dallas, Texas.

Mr. McEachen: That's right.

The Court: Well, as I view it—will the Government stipulate to that?

Mr. McEachen: I haven't seen the wire, incidentally.

The Court: Will the Government stipulate that the message alleged to have been sent was addressed to someone in Mexico City?

Mr. Abbott: We will stipulate that is the fact, your Honor. That is not the sole fact material to the determination——

The Court: Well, one fact at a time. Is the message that the Government is going to rely upon here? Is the message which is charged in the indictment, is it here?

Mr. Abbott: I understand that the witness, in response to a subpoena duces tecum by the defendant, has it in his possession.

The Court: Don't you have a copy?

Mr. Abbott: I know its contents. [4]

The Court: Can't you gentlemen stipulate to a copy of it?

Mr. Abbott: There is this problem, that counsel

wishes to stipulate some but not all the facts material to this question.

The Court: What else is there material?

Mr. McEachen: Let's make the record clear on this point: I did discuss the matter with counsel at an earlier date in connection with the prospective trial of the case, and in the interest of saving some money along the line he brought up the subject of the wire passing through a point in Texas, San Antonio, Texas, and then sent on to Mexico City.

The Court: Well, I suppose the Government will be required to prove as part of its case that the message crossed state lines.

Mr. Abbott: And was received at San Antonio, Texas; was there decoded, a copy prepared, and placed on another line and sent into Mexico. As the court undoubtedly knows, Mexico does not have a private telegraph system. The telegraph is a Mexican government monopoly and at some point in or near San Antonio it becomes necessary for the message to be received, decoded and placed on the Mexican line, as the Government evidence will show. But I think we should not—in no event could our stipulation or the testimony of this witness be pertinent to the motion to dismiss. [5]

The Court: As I understand it we are not here today to rule on this part. We are here to rule on the sufficiency of the indictment, and it wouldn't be, strictly speaking, a part to be considered on a motion addressed only to the sufficiency of the indictment, would it?

Mr. Abbott: There is a good deal of authority

which the Government can cite to the court at this time in support of the proposition that not even a bill of particulars can be looked at to determine the question before the court at this time.

The Court: As to whether or not the indictment charges an offense——

Mr. Abbott: Yes, your Honor.

The Court: ——within the jurisdiction of the court?

Mr. McEachen: Within the jurisdiction of the court. However, there is a little different approach to it as I studied the section; where the communication sought to be introduced is the very heart of the alleged violation, if your Honor please.

Mr. Abbott: Of course, the Government is at a decided disadvantage in not being on notice that we were going to take oral evidence at this time. If it is proper—and the Government asserts it is not—to take oral evidence in connection with a motion of this type, the Government would call its own witnesses. But the Government had no [6] notice by way of counsel's moving papers that such a procedure would be followed here. And I think counsel would concede it would be unique. In my experience at the bar we never had a hearing on a motion to dismiss in which we took oral evidence on one of the issues, provided by the indictment, of a not guilty plea.

The Court: Well, the court will rule that in passing upon the sufficiency of the indictment only the four corners of the indictment may be looked at, except possibly to illumine the meaning of words.

I recall a case which the Supreme Court reversed, the Specter case, in which I had a motion to dismiss upon the grounds the statute was vague and indefinite. I considered the indictment and considered the statute and wrote a memorandum holding that the statute was unconstitutionally vague and indefinite and dismissed the action.

The Government appealed, and by the time it got back to Washington they had regulations and forms and all manner of things that I never saw or heard of in ruling here; and the Supreme Court took those and Mr. Justice Douglas, with the aid of the forms used by the Attorney General's office and regulations by the Attorney General's office, added all that to the statute, and when that was all added to the statute they decided the statute was perfectly definite and met the requirements of the Constitution. [7]

Now, they didn't say anything about taking evidence dehors the indictment in the opinion, but of course that is the effect of it. The effect of it was that the Government used regulations and forms promulgated by the Attorney General to buttress the insufficiency of a statute probably more directly; in an indictment, indirectly.

Mr. McEachen: I prepared that indictment. I am familiar with that case. But in this Edwards case that I cite—and I respectfully urge it upon your Honor in connection with this matter—the case definitely not only indicates it is definite authority for the proposition that evidence is proper, but as a matter of fact in the Circuit Court, the Cir-

cuit Court affirmed the lower court on that basis, which the Supreme Court later reversed.

The Court: How can you show by this witness, unless the Government stipulates, that the message he has is the message referred to in the indictment?

Mr. McEachen: Well, in that connection I have discussed the matter with the attorney for the Government, and with all due respect to him, if I recall correctly, he said they did not have the message. He didn't say they didn't have the contents of it, that is true. Maybe we can stipulate. I have never asked them directly to do that. But here is the point, your Honor——

The Court: I was considering that in [8] connection with your motion for a bill of particulars, and I was inclined to the view that you would be entitled to a copy of the message because, non constat, there may have been 40 messages sent by the same people on the same day, or other people.

Mr. McEachen: I have an answer to that one, too: by the indictment, your Honor, if you consider only the four corners of the indictment, the indictment recites "a message," or "a signal."

The Court: You reach that on a motion for a bill of particulars, don't you?

Mr. McEachen: I used the two approaches for that specific reason, if your Honor please. I thought I would be entitled to it on either basis.

The Court: You may swear the witness, and I will hear the witness's testimony, and then we will decide what to do with it after we hear it.

Mr. Abbott: May it be understood, in the interest

of brevity, that the Government makes an objection on the ground previously stated to all the testimony to be elicited from this witness so it won't be necessary to interrupt with further objections?

The Court: It may be so understood. [9]

### J. E. MEANEY

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. McEachen): Mr. Meaney, did you produce a document pursuant to subpoena duces tecum issued to the Western Union Telegraph Company? A. I did.

Q. Are you an employee of the Western Union Telegraph Company? A. I am.

Q. Do you have such a document in your possession? A. I have.

Q. Does that document reflect matters which are handled in the regular course of the business of the Western Union company? A. It does.

Q. Is it a part of their records? A. It is.

Mr. McEachen: May I have the document?

The Witness: Not until the court orders me to produce it.

Q. (By Mr. McEachen): What is the date on the document?

A. The date is November 22, 1955. [10]

Q. What is the point of origin of the wire?

A. Los Angeles, California.

Q. And who was the sender?

(Testimony of J. E. Meaney.)

A. Mrs. Selma Morse, M-o-r-s-e.

Q. What point is indicated on the wire as the point of destination of the wire?

Mr. Abbott: Objection, your Honor. That calls for the contents of the document. It has not been adequately identified as to foundation and is not in evidence. And, therefore, a question as to content is improper at this time.

The Court: Overruled. I will rule that part of the foundation in this case is to show the addressee as well as the sender.

Will you tell us who, Mr. Meaney, is the addressee?

The Witness: The addressee is J. E. Walters; address, Hotel Reforma, Mexico D. F., Mexico.

Q. (By Mr. McEachen): Is there any other indication as to the destination of that wire?

A. No. That is the destination.

Mr. McEachen: I believe that is sufficient for the foundation purposes, your Honor.

The Court: How long have you been with Western Union, Mr. Meaney?

The Witness: Well, Judge, your Honor, I think 52 years. [11]

The Court: I thought it was about that.

Do you know how these messages are sent——

The Witness: You bet I do.

The Court: ——to Mexico City?

What is the technique or the *modus operandi* of sending one from Los Angeles to Mexico D. F.?

(Testimony of J. E. Meaney.)

The Witness: Well, this telegram was accepted on the telephone from Richmond 7-8038, was charged to that telephone; the subscriber, 1062 West 30th Street; filed 4:45 p.m., November 22nd; the address of J. E. Walters, Hotel Reforma, D. F. Mexico. And the text——

The Court: Just how was it sent down there?

The Witness: Well, we transmit it to Dallas, and Dallas relays it to San Antonio and San Antonio then sends it to Mexico City.

The Court: Now, may it be stipulated that the message that the witness has referred to is the message referred to in the indictment?

Mr. Abbott: May I take the witness on cross examination before answering the court's question in that regard?

The Court: Is there any objection?

Mr. McEachen: No, your Honor.

The Court: You may. [12]

### Cross Examination

Q. (By Mr. Abbott): Mr. Meaney, do you know whether Western Union has any lines to the Republic of Mexico?

A. No, they have not, now.

Q. Then, what is the means by which a message is relayed from San Antonio, Texas to Mexico City?

A. Over the Mexican lines. We have our lines to the border, and the Mexico City lines take up from there into Mexico City.

Q. Do you know whether the message is taken



(Testimony of J. E. Meaney.)

off the wire and decoded at any point prior to the entry into Mexico?

A. Not after it—after the transmission from San Antonio, no.

Q. Well, is it decoded at any place in Texas?

A. It is sent to Dallas. And then we have an automatic machine which makes a reperforation and then it is sent to San Antonio and from San Antonio to Mexico City.

Q. Well, is there any place in the route between Los Angeles and the Mexican-Texas border at which the message is decoded?      A. Oh, no, sir.

Q. Do copies of the message exist at any point in the offices of Western Union?

A. At Dallas it would exist on a tape, [13] what we call a reperforation.

Q. Isn't it a fact that a copy is made at San Antonio?

A. In San Antonio there would be a copy.

Q. And messages are decoded at that point prior to being transmitted to Mexico City?

A. Maybe we are not together on the word "decoded."

The Court: You mean transmitted?

The Witness: Retransmitted.

Q. (By Mr. Abbott): Isn't it a fact that at San Antonio, Texas, the electrical impulse is translated into a message, a written message in words?

A. That's right.

Q. And then that written message is again trans-

(Testimony of J. E. Meaney.)

lated into an electrical impulse, placed upon the wire to Mexico City?

A. That's right. The electrical impulse is put on tape reperforation and the tape goes through and prints the message.

The Court: The message is sent from here in English?

The Witness: It is delivered there in English to them.

The Court: Delivered in Mexico City, so there is no translation.

The Witness: No translation.

Q. (By Mr. Abbott): Isn't it a fact then that at the time the message is received in San [14] Antonio, Texas a full copy of it is made which becomes a part of the San Antonio files of Western Union? A. Yes.

Q. And isn't it a fact that at San Antonio some employee of Western Union Telegraph Company takes the written copy of the message, so received, and relays it onto to Mexico City?

A. That's right, retransmits it.

Q. To Mexico City? A. That's right.

Q. And for that purpose the lines of the Mexican government telegraph system are used, are they not?

A. That's right, for transmission and delivery.

Q. Now, do you know whether the routing used in this instance, Mr. Meaney, is the routing used in the ordinary course of business by Western Union? A. It is.

(Testimony of J. E. Meaney.)

Q. Is there any other routing of a message from Los Angeles to Mexico City in the ordinary course of business?      A. No, no.

Q. Does Western Union have the physical facilities to send a message from Los Angeles to Mexico City directly across the California-Mexican line?

A. No. If we had any wire trouble in San Antonio or Dallas we would send it to New York City, and New York City [15] would send it to Mexico City. But we have no system whereby we could send it otherwise. It would have to go through some other way into Mexico.

Q. In other words, any message sent by Western Union to Mexico must necessarily be sent across the state line?      A. That's right.

Q. There is no way by using existing physical facilities to send such a message across the California-Mexican line?      A. Not into Mexico City.

Q. Is that because of the inadequate communication facilities existing between Baja, California and Mexico City?

A. Well, it's probably inadequate—not inadequate for our purposes.

Q. Well, you mean that you have other routing available which makes——

A. Emergency, storms or anything like that, we always find some way. Western Union must deliver, you know.

Q. And so if you can't go through San Antonio you go through New York in the manner you described?      A. That's right.

(Testimony of J. E. Meaney.)

Mr. Abbott: The Government will stipulate that the message described by the witness is the message described in the last paragraph of the indictment.

The Court: Do you wish the contents of it to appear in the record?

Mr. Abbott: Yes, your Honor.

I would like to say in so stipulating, your Honor, that we adhere to the position that any evidence taken on this point, including our stipulation of facts, is not material to the motion. But we make the stipulation.

The Court: Very well.

Will you read the message itself, the words of the message?

The Witness: It reads: "Leaving Wednesday 3:45; arriving Mexico 11:15 p.m. Love." Signed "Selma."

The Court: Is there anything further from Mr. Meaney, gentlemen?

Mr. McEachen: No, your Honor.

Mr. Abbott: Nothing further, your Honor.

The Court: You may step down, Mr. Meaney.

The Witness: Thank you.

(Witness excused.)

The Court: Anything further, Mr. McEachen?

Mr. McEachen: I won't burden your Honor any further in connection with the matter of material indicated in the motion itself. I don't think that the brief filed by the [17] Government adequately meets the situation here. This statute is part of the Communications Act of 1934. The definitions indi-

ated there are applicable, even though it appears in Title 18. And the statute itself excludes foreign messages; while in other parts of the Act you find them referring to "interstate" and "foreign." It is obvious that Congress omitted that and intended to omit that, and that a foreign transmission is not within the section. The Government is bound by that.

The cases that I have cited are right on the point. It is the message as it is transmitted at the point of origin that determines its nature, whether or not it be interstate or foreign; and any routing or re-routing or other mechanical features of the transmission of a message do not change the complexion of it. It is a foreign message from the outset and it cannot be interpreted as being any other type.

I have cited to the court various definitions of "interstate" and "foreign" as pointed out in one of the cases that I mentioned, which well footnotes the situation. And the two cases that I cited are cited purely for the purpose of showing that it is the express intention from the outset of the journey from the point of origin that determines the type of message it is, having in mind the distinction between an interstate and foreign message; and at that point it takes its nature as interstate or as a foreign [18] message, and the nature of it cannot be changed after that time.

The Court: The motion to dismiss will be denied.

It is my view that the phrase "\* \* \* transmitted by means of interstate wire \* \* \*" as used in Section 1343 of Title 18 means if the message is trans-

mitted over state lines, whatever may be its destination. And, of course, that is the basis for making it a federal offense at all.

Now, there is no motion for a bill of particulars, is there?

Mr. McEachen: Yes, there is, your Honor.

The Court: In view of the Government's stipulation here today with respect to the message, is there any occasion for any further particulars?

Mr. McEachen: Well, we have asked for the particulars with respect to each of the defendants having caused—in what manner they caused these communications.

The Court: Isn't it pretty obvious that this may be analogized, the message itself may be analogized to an overt act done pursuant to a conspiracy. Isn't that the gist of it?

Mr. McEachen: It takes on those aspects, yes. Of course, we don't have a conspiracy case before you.

The Court: I suppose in the sense that they alleged they caused it; alleging in effect the conspiracy here and the setup caused it.

I don't see where you would need anything [19] further in detail than that to be able to plead and defend and identify the cause or crime asserted and the offense alleged. I was concerned about identifying the message as being a particular message, but apparently the testimony that has been taken this afternoon, plus the stipulation, would take care of that, would it not, in the record?

Mr. McEachen: It covers the situation. That was my principal point.

The Court: The motion for a bill of particulars will be denied.

The Government will prepare the orders on the motion. [20]

Los Angeles, California, May 21, 1956,  
Monday, 2:00 P.M.

The Court: Case on trial.

The Clerk: 24,950 and 24,808, United States of America, plaintiff, vs. Michael Victor Schlising, Emil Wentz and William Bering Jensen for jury trial as to all defendants.

Mr. McEachen: Ready for the defendants, your Honor.

Mr. Abbott: Ready for the Government, your Honor.

Mr. McEachen: May we approach the bench, your Honor?

The Court: Yes.

(The following proceedings were had without the hearing of the jury venire):

Mr. McEachen: The defendant Schlising is not here, your Honor, and I have no idea where he is.

I also have some motions to make and may that be done in chambers outside of the hearing of the jury?

The Court: Very well.

(The following proceedings were had in chambers out of the presence and hearing of the jury venire):

The Court: Shouldn't the defendants be present?

Mr. McEachen: There is a waiver on file and it is agreeable to have the matters heard in chambers without the presence of the defendants.

The Court: Very well. I have examined your authorities. I haven't, however, examined the authorities presented by [5] the Government.

In addition to that I consulted with my colleagues at a round table conference.

I know that it is your desire to get through with this case this week.

Mr. McEachen: I understand that, your Honor.

The Court: And I do also.

Mr. McEachen: And I understand that, your Honor.

The Court: I am going to deny your motion but it is a proper matter to bring up on a motion for a new trial.

I am perfectly willing that your motion be submitted and that you have a running objection on the grounds stated in your motion throughout the trial so that your rights will be properly protected.

If there is not a conviction then there is nothing to worry about.

Mr. McEachen: I appreciate that, your Honor.

The Court: But if there is a conviction then I will consider your motion on a motion for a new trial.

Mr. McEachen: May I indicate Mr. Matthews' presence here as co-counsel. He will be associated with me in the trial of the case. Pardon me, did you have something?

Mr. Abbott: When you are finished.



Mr. McEachen: All right. In other words, that will avoid any necessity of presenting anything further at this [6] time with regard to the motion.

The Court: I have read your motion and authorities and I have read the affidavits.

Mr. McEachen: Yes, your Honor.

The Court: And I am taking the position that we do have jurisdiction of the parties and that we have a right to proceed.

Mr. Abbott: May it please the court, this motion to dismiss, which is the second motion to dismiss, was first served upon our office at 3:00 o'clock p.m. Friday and as a result we have just completed the preparation of our opposition to the motions. I would like to——

The Court: I would like to have that because I want to see if you can support the position I have taken or whether there are any cases to the contrary.

I am not making a conclusive ruling on the motion at this time. I want that understood.

Mr. McEachen: Yes, your Honor.

The Court: We have called a jury panel here. You have had a long time to prepare and present this motion.

Mr. McEachen: I understand that, your Honor. I will say in that regard, however, that the import of it had not come to me at the time that I prepared the other motion, otherwise it would have been prepared and presented earlier.

The Court: I am sorry it didn't come in sooner so that [7] somebody else would have had to pass

upon it, but I have gone over it again this morning and have done considerable research on the question and I don't feel the motion is well taken. However, it may be well taken on a motion for new trial in the event there is a verdict against you. If there is a verdict in your favor then it is immaterial.

Mr. McEachen: In reading the Rosenberg case I find there was a matter of similar circumstance. The defendant first brought it to the attention of the court in a motion in arrest of judgment.

The appellate court said in substance that the motion was timely and that if the court found the defendant's position was well taken it could grant a judgment of acquittal notwithstanding the verdict and let the Government appeal.

Mr. Abbott: May I say this, sir?

The Government was not served with adequate notice and has not waived notice in connection with this motion and does not waive notice in connection with the motion.

Further, in addition to the authorities cited in our memorandum, we have just noted that in the advance sheet in the Schmittroth case—Bert Strand, Sheriff, vs. Schmittroth which was an appeal from a judgment in this district, contains a complete discussion of the authorities on this point.

I don't think that is cited in our memorandum.

\* \* \* \* \*

Los Angeles, California, May 22, 1956,

Tuesday, 9:30 A.M.

\* \* \* \* \*

J. E. MEANEY

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: J. E. Meaney. [210]

Direct Examination

Q. (By Mr. Abbott): Mr. Meaney, what is your occupation?

A. Chief special agent, Western Union Telegraph Company.

Q. How long have you been employed by Western Union, Mr. Meaney?      A. 52 years.

Q. You are fairly well acquainted there, I take it now?      A. I hope so—I am.

Q. What positions have you held in the company in addition to your present position?

A. Well, all the way from messenger up to manager and operations manager, city commercial manager, accounting, personnel.

Mr. Matthews: I will stipulate he knows more about it than the president does. I know Mr. Meaney.

Mr. Abbott: I will accept the stipulation.

Q. (By Mr. Abbott): Mr. Meaney, have you appeared today in response to a subpoena duces tecum?      A. I have.

Q. And have you brought with you the documents described in that subpoena duces tecum?

A. I have.

Q. What is that document, sir?

A. It is a telegram telephoned from telephone

(Testimony of J. E. Meaney.)

number [211] Richmond 7-8038 Los Angeles, dated November 22nd, 1955.

Q. To whom is that telegram addressed?

A. J. E. Walters, Hotel Reforma, Mexico, D. F., Mexico.

Q. And how is that signed, Mr. Meaney?

A. It is signed "Selma."

Q. Now, is what you are examining the office copy of a telegram that was put on your wires, Mr. Meaney?

A. It is.

Q. And does it constitute the entire record maintained by Western Union in Los Angeles relative to that telegram?

A. It does.

Q. May I have it to mark it as an exhibit, sir? Actually I see you have with you not one but several other papers. Do any of those papers relate to the telegram described in the subpoena duces tecum, Mr. Meaney?

And while you are looking I will ask the clerk to mark the document last described by the witness as Government's Exhibit next in order for identification.

The Clerk: Government's Exhibit 11 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 11 for identification.)

Q. (By Mr. Abbott): Is Government's Exhibit 11 for identification, Mr. Meaney, a document that is maintained in the regular course of business by the Western Union Telegraph [212] Company?

A. It is.

(Testimony of J. E. Meaney.)

Q. And is it the regular course of business for Western Union to make such a record at or about the time that it accepts it and sends the telegram described in the record?

A. Well, immediately it is transcribed as the party is telephoning it to the operator.

Q. This is a record made immediately during the transaction?           A. Immediately.

Mr. Abbott: We offer Government's Exhibit 11 in evidence, your Honor.

Mr. Matthews: May we see it, your Honor?

(Document handed to Mr. Matthews.)

Mr. McEachen: If your Honor please, there will be an objection at this time to the introduction of the document in evidence. The objection is based primarily upon the fact that the document itself indicates that the origin of the document is in Los Angeles, California and that at the point of origin the document was destined for Mexico City, D. F., and that as such it is a transmission to a foreign country and as such not within the statute under which the defendants here are prosecuted, which pertains only to interstate transactions.

Mr. Abbott: Your Honor, in view of counsel's objection [213] may I have a few moments? I would like to ask a few more questions relating to the foundation before the court rules.

The Court: Yes.

Q. (By Mr. Abbott): Mr. Meaney, are you familiar with the customary and usual routing of telegrams from Los Angeles to Mexico City?

(Testimony of J. E. Meaney.)

A. I am.

Q. What is the customary and usual routing of such telegrams?

A. Well, after it is received here it is transmitted automatically to Dallas, and then from Dallas it is transmitted again from Dallas to San Antonio.

Q. Both in Texas?            A. Pardon me?

Q. Both in Texas, sir?

A. Both in Texas. And when it gets to San Antonio, the hard copy, what we call a copy, a hard copy is made in San Antonio and then re-transmitted from San Antonio over Mexican lines to Mexico City.

Q. Now, is the copy at San Antonio identical with the text of the message and the addresses and signature of the message as first transmitted at Los Angeles.

A. Well, not seeing the copy at San Antonio I couldn't say that.

Q. In the ordinary course of business? [214]

A. Yes, in the ordinary course of business.

The Court: You have no direct lines to Mexico City, have you?

The Witness: No, sir.

The Court: It has to go to a place and from there it is transmitted over the Mexican telegraph lines?

The Witness: Yes, over Mexican telegraph lines from our office in San Antonio.

Q. (By Mr. Abbott): At San Antonio does the

(Testimony of J. E. Meaney.)

message come in over one line and is it then subjected to some physical handling before it is put on another line?

A. It comes over what we call a printer and makes a copy and then they transmit them—they make a copy—they make a copy and transmit that to Mexico City.

Q. Well, is the message handled in some fashion by employees at San Antonio between the time it comes off of one line and the time it is put on another line? A. Oh, yes, yes.

Q. Where is the point where Western Union lines connect with the line operated by the Mexican government? A. San Antonio.

Q. Right at San Antonio or in that general vicinity? A. San Antonio.

Q. Is there any direct telegraphic communication across the California-Mexican border and connecting Los [215] Angeles with Mexico City?

A. No, sir.

Q. Does Government's Exhibit 11 for identification bear any serial number by which it is identified in the records of the Western Union, Mr. Meaney?

A. Yes. Here is the number. This equal sign D indicates what we call the routing. D means Dallas and it is automatically switched on the machine to Dallas and it is numbered 484. That is the number of the telegram that is transmitted to Dallas.

Now, when they receive that at 4:45 p.m. and to show you what good service we have, it was transmitted at 4:50 to Dallas.

(Testimony of J. E. Meaney.)

Q. All right, sir. We will renew the offer of Government's Exhibit 11 in evidence.

Mr. McEachen: I wish to elaborate on my objection.

My objection is predicated upon the fact that the statute here in question is part of the Communications Act of 1934 as amended, which Act defines interstate communications and foreign communications as follows:

"Interstate communications or interstate transmissions means communication or transmissions——"

Mr. Abbott: Your Honor, I am sorry to object but this matter has been argued and ruled upon and in any event it would not be appropriate for argument at this time. There [216] has been a ruling on this very point.

The Court: I want him to make his record because I am going to overrule his objection.

Mr. Abbott: I will stipulate he may incorporate by reference all the arguments and briefs he has previously filed up to this point, your Honor.

That stipulation is tendered in the hopes we can avoid a repetition of the argument at this time.

The Court: I am not going to listen to much argument. Don't worry about that, counsel. We are going to get through with this case this week.

Mr. McEachen: So far we haven't taken up very much of your time, your Honor.

The Court: I am appreciative of that, too.

Mr. McEachen: Thank you.



(Testimony of J. E. Meaney.)

Mr. Abbott: I might say the Government's case is moving more rapidly than we estimated, your Honor. We will be able to meet the time limit.

Mr. McEachen: I only wish to point out one thing. There is a definite definition as to interstate communications within that Act and that Act also makes definite definitions with respect to foreign communications and I want to call your Honor's attention, with respect to the objections to the introduction of this evidence, and on the basis that this communication by its very nature is a foreign communication [217] only.

The Court: Objection overruled. It will be admitted.

The Clerk: Government's Exhibit 11 in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 11, was received in evidence.)

The Court: I don't know how a telegraphic message could get out of the State of California without crossing a state line. The message itself had to cross a state line. It had to cross the Arizona and New Mexico borders before it hit Texas.

Mr. McEachen: My only basis——

The Court: On account of the designation, I understand.

Mr. McEachen: It is based upon my——

The Court: If this law doesn't cover this kind of offense, if it is an offense, in view of what has happened, or if the jury believes, for instance, the first witness on the stand here, without making any comment on the evidence and I am not going to make

(Testimony of J. E. Meaney.)

any comment on the evidence now or any other time, but at least it shows a prima facie case according to my view under the statute. But whether the reviewing courts agree with me is a different matter.

Mr. McEachen: Well, of course, that is the exact purpose of my objection.

The Court: I understand. You are protecting your record. [218]

Mr. McEachen: My position has been reserved and it is incorporated in the motions to dismiss which is completely in the record.

The Court: I think your record is protected.

\* \* \* \* \*

Los Angeles, California, May 23, 1956,  
Wednesday, 9:30 A.M.

\* \* \* \* \*

M. G. McGEE

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name. [239]

The Witness: M. G. McGee.

The Court: You will have to speak up.

The Witness: McGee.

Direct Examination

Q. (By Mr. Abbott): What is your occupation, sir?

A. I am superintendent of the Western Union Telegraph Company at San Antonio, Texas.

(Testimony of M. G. McGee.)

Q. How long have you been employed by Western Union?      A. 41 Years.

Q. And are you the chief officer or employee of Western Union at San Antonio?      A. Yes, sir.

Q. And as such do your duties include general supervision and responsibility for messages going from points in the United States through San Antonio to points in Mexico?      A. Yes, sir.

Q. Have you brought with you today pursuant to a subpoena duces tecum, a record of the San Antonio office of Western Union?      A. Yes, sir.

Q. Will you describe that record, please?

A. I have in my hand a telegram which was sent from Los Angeles at 4:45 p.m., Pacific time, on November 22nd, addressed to J. E. Walters, Hotel Reforma, Mexico City, [240] Mexico, reading:

“Leaving Wednesday 3:45. Arriving Mexico 11:15 p.m. Love.”

And it is signed “Selma.”

Q. Now, does that telegram have any identifying numbers or letters on it?      A. Yes, it does.

Q. What are they?

A. It has the number under which the telegram was transmitted from Los Angeles to Dallas, the number from which Dallas transmitted the message from Dallas to San Antonio and also a number where we sent it from San Antonio to Mexico City.

Q. What is the Los Angeles identifying number?      A. LY484.

Q. Is the telegram from which you are now

(Testimony of M. G. McGee.)

reading a document which is prepared in the ordinary course of business of Western Union?

A. It is.

Q. And is it the ordinary course of business of Western Union to make such a record at or about the time of the transmission which is there described?

A. This is the regular procedure for handling traffic of this sort.

Q. In other words, would such a record as you are now [241] holding be made at or about the time that the transmission comes in on the wire from Los Angeles via Dallas? A. Yes.

Q. May I have the document, sir.

Mr. Abbott: May the document described by the witness be marked Government's next in order?

The Court: Has counsel seen it?

Mr. McEachen: I haven't seen it.

The Court: It may be so marked.

The Clerk: The document referred to is marked Government's Exhibit 12 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 12 for identification.)

Q. (By Mr. Abbott): Would you describe how the messages from Los Angeles to Mexico City are routed, Mr. McGee?

A. The normal routing of telegrams from Los Angeles to Mexico City is through Dallas, and from Dallas to San Antonio and then from San Antonio to Mexico City.

Q. Now, are the lines connecting Los Angeles

(Testimony of M. G. McGee.)

and Dallas wholly within the continental limits of the United States?      A. They are.

Q. And is that also true of the lines connecting Dallas and San Antonio?      A. That is correct.

Q. What is the physical handling of the transmission [242] at Dallas? What happens there with respect to such a message?

A. The messages, when they are sent from Los Angeles or sent through what we call a perforated transmitter, a tape is punched with a keyboard affair and then the punched tape is sent—put through a transmitter and as that tape goes through the transmitter it reproduces the message on a similar tape in the Dallas reperforater center and that reperforated tape in Dallas is then sent through another transmitter which reproduces the same telegram at San Antonio.

Q. And what happens with respect to that same message when it is received at San Antonio?

A. The messages come into San Antonio on a tape, a gummed tape and it is gummed down on a blank as it is there, and then it goes to the operator who sends all messages to Mexico City, for transmission.

Q. Now, when the message is received at San Antonio and is recorded on a gummed tape and the tape is placed on a blank, is the result a message similar to the message which would in fact be delivered at San Antonio had that been the point of destination?

Mr. McEachen: I will object to that as calling

(Testimony of M. G. McGee.)

for a conclusion of the witness and not within the issues of this case.

Mr. Abbott: Perhaps we can meet the objection by offering [243] the record in evidence, your Honor, now that counsel has had a chance to inspect it. We offer Government's Exhibit 12.

The Court: It will be admitted.

(The exhibit referred to, marked Plaintiff's Exhibit 12, was received in evidence.)

Mr. Abbott: May Government's Exhibit 12 be shown to the jury?

The Court: All exhibits will be shown to the jury either here or in the jury room.

Mr. Abbott: Would it be permissible to show it to the jury now?

The Court: He has already read the telegram.

Mr. Abbott: I thought the jury might be interested in the form and appearance of the document.

The Court: I have no objection to its being passed to the jury.

Mr. McEachen: Has there been an offer to admit that into evidence, if your Honor please?

The Clerk: I understood the court to say it was admitted.

The Court: Yes, it is admitted.

Mr. McEachen: May I make a motion to strike and to renew my objection based on the former argument made in connection with the nature of the wire?

The Court: Yes. The objection is overruled.

(Testimony of M. G. McGee.)

(Document handed to the jury.)

Q. (By Mr. Abbott): Now, you described the means by which the telegrams comes into San Antonio, Mr. McGee, and comes off the wire and is recorded. What happens next, sir?

A. The message is then given to the operator working the circuit to Mexico City and it is then—another tape is prepared, perforated and that tape is passed through a transmitter and as it passes through the transmitter it automatically reproduces the same telegram at Mexico City.

Q. Is that similar to or different from the procedure that would be followed if a message were initiated in San Antonio to be sent to Mexico City?

Mr. McEachen: I object to that as being immaterial.

The Court: What is your point?

Mr. McEachen: Pardon me, your Honor.

The Court: He is testifying about the procedure.

Mr. McEachen: It is not material to the issues of this case, what happens to a message that is sent from San Antonio.

The Court: I think the objection is well taken, counsel.

Q. (By Mr. Abbott): Well, is the transmission from San Antonio to Mexico City one that requires a number of acts by some human being or is it an automatic thing that is done by machines?

Mr. McEachen: Same objection. [245]

Mr. McEachen: As to this message?

(Testimony of M. G. McGee.)

Mr. Abbott: As to this message, yes.

The Court: Objection overruled.

The Witness: Will you state the question again?

Q. (By Mr. Abbott): I can perhaps make it more clear. I realize it may have been uncertain.

Is there the act of some employee of the company required to begin the transmission from San Antonio to Mexico City?

A. That is correct. An employee of our office has to handle the message. In fact all of the messages that are destined to Mexico City have to be prepared and transmitted by our operator.

Q. Now, is there a direct line from San Antonio to Mexico City or are there way points?

A. They are direct circuits.

Q. Do those circuits go by way of Nueva Laredo?

A. They go through there but there is no stop. What I mean by that is, they go direct from San Antonio to Mexico City. There are no other offices connected on the circuit.

Q. But at what point on the border, if you know, does the line cross?

A. The line crosses the river over the bridge between Laredo, Texas and Nueva Laredo, Mexico.

Q. I guess my Spanish isn't very good—Nuevo?

A. Nueva, N-u-e-v-a.

Q. Who owns the line from San Antonio to the point where it crosses the border in the fashion you have described?



(Testimony of M. G. McGee.)

A. The boundary line is in the middle of the river or the bridge there between Laredo and Nueva Laredo and technically the circuits are joined at the boundary. However, for physical purposes the lines, power lines go all the way over. In other words, the same wire is there. There is no break in the wire there in the middle of the bridge. The wire is continuous from Laredo, Texas to Nueva Laredo, Mexico and the Western Union Company and the Mexican government share in the cost of that circuit.

Q. Now, sir, do you know the customary and usual routing of telegrams from points throughout the United States to Mexico City?      A. Yes.

Q. What is that routing?

A. We have four connections between the United States and Mexico.

Q. Would you confine your answer to Mexico City?

A. All right. Mexico City. The circuits—New York works directly with Mexico City and handles the traffic for the 12 northeastern states.

The balance of the traffic between the United States [247] and Mexico is handled through San Antonio.

Q. Now, is there any direct wire communication between Los Angeles and Mexico City crossing the California-Mexican border?      A. No.

Mr. Abbott: No further questions, your Honor.

The Court: Any cross examination?

Mr. McEachen: Yes, your Honor.

(Testimony of M. G. McGee.)

Cross Examination

Q. (By Mr. McEachen): Mr. McGee, would there be any indications on this wire by means of symbols as to its origin and destination?

A. Of course it shows it originated right here. That is the normal place to show where a message originates.

Q. Now, you are referring to the words "Los Angeles, California"?

A. Los Angeles, California, that is right. That is always considered the date line or originating office.

Q. Now, there are other symbols on here. Where were these symbols made?

A. They were made here in Los Angeles.

Q. Now, starting, for example, above the border line which surrounds the message I see the symbols "DB654." What do they represent?

A. That is the number that the Dallas office put [248] on the message when they send it down here.

Q. When you say "down here" what do you mean? A. I mean San Antonio.

Q. What does the symbols LC337 indicate?

A. That is the circuit.

Q. And what circuit does that designate?

A. That is Los Angeles.

Q. And does it have any further meaning?

A. No, sir.

Q. Well, then, what do you mean by that generally? Is that a symbol indicating that the message

(Testimony of M. G. McGee.)

emanated from Los Angeles?                    A. Yes, sir.

Q. Does it mean anything more?

A. No, sir.

Q. That is all?                    A. That is all.

Q. Now, let us get down to the symbols inside of the border. In the upper left-hand corner I see a symbol L. What does that refer to?

A. That is the circuit. Those are the circuits identifying numbers.

Q. Well, what circuit does it identify?

A. We will have a series of circuits and each one of them has a particular letter or number to indicate a circuit [249] and that is what those are.

Q. Well, what type of circuit would you say that indicates?

A. Well, the normal, regular everyday circuit that we work.

Q. What is the origin of that circuit and the destination?

A. Well, it indicates that the circuit between Los Angeles and Dallas—that is the circuit between Los Angeles and Dallas, Texas.

Q. All right. And the rest of this—is there any further or different meaning?

A. No, sir; only each message has a different number on it and this happens to be the number of the message under that circuit.

Q. Referring to 484 after the letters LLY, is that correct?                    A. Yes, sir.

Q. Now, the letter MEX, what do they refer to?

A. That indicates it is traffic going to Mexico.

(Testimony of M. G. McGee.)

Q. And where is that affixed by the Western Union?      A. At Los Angeles.

Q. And the other symbols, the number 8 following that?      A. That is the number of words.

Q. And PD? [250]

A. Means it was paid for in Los Angeles.

Q. Does it indicate at what type of rate it was paid for?

A. In the absence of any other indicator that means it was sent at a fast message rate, full rate.

Q. Is there any indication of a differentiation here—that is, whether or not it was sent at an interstate or foreign rate?

A. We consider from our accounting records, that the Mexico traffic is considered a part of our domestic traffic.

Q. From an accounting point of view?

A. That is right and our——

Q. In other words, there is no differentiation from the point of view of accounting between a rate interstate and a rate sent to a foreign country, for a message sent to a foreign country or at least to Mexico? I am trying to clarify rather than confuse you.

A. I am not sure that I exactly understand but I will say that we have certain classes of traffic that we consider international traffic.

Q. I see.

A. But we do not consider Mexico as international traffic.

Q. Even though it is international?

(Testimony of M. G. McGee.)

Mr. Abbott: I object. This witness is not going to [251] testify as to what international means. He is here to testify as to what Western Union does.

The Court: That is quibbling.

Mr. McEachen: It is argumentative. I will withdraw it.

The Witness: You are talking about accounting—I thought that was what you had in mind.

The Court: Then you have an accounting with the Mexican government, do you?

The Witness: Yes, sir.

Q. (By Mr. McEachen): Now, with respect to this particular message, do you have any idea how long it was in transit from the point of origin at Los Angeles to Mexico City?

A. If you will let me have it I will tell you.

(Document handed to the witness.)

A. It was given to our office here in Los Angeles at 4:45 p.m. Pacific time. It reached San Antonio at 7:04 p.m. Central time, two hours difference in time. In other words, 4:45 p.m. here is 6:45 there so it was 19 minutes from Los Angeles to San Antonio. And we sent it to Mexico City at 7:04 p.m.—No, 7:17 p.m. In other words, it was 32 minutes between Los Angeles and Mexico City.

Q. I show you Government's Exhibit 11 and ask you to compare Government's Exhibit 11 with Government's Exhibit 12 and indicate if there is any difference in them insofar as the message is concerned? [252]

A. They look identically the same. What I mean

(Testimony of M. G. McGee.)

by that is, the operator transmitted it just exactly what she was supposed to transmit. There is certain information on the sending blank here that is not transmitted, such as the telephone number and the address, local address of the person who sent it.

Here is your MEX 8 PD.

Here is the first thing the operator sends, 484 LLY and then here is your MEX PD, which means paid and then, of course, we have Los Angeles and there is the filing time, 4:45 p.m. and then the operator starts out here and in here is the destination and here is the signature.

Q. Now, this destination as indicated here on Exhibit 11, Mexico D. F., that is taken off and handled where on the other exhibit, Exhibit 12?

A. The question now has to do with——

Q. In other words, where in this exhibit, and we are referring to Exhibit No. 12, is the term “destination Mexico, D. F., Mexico” found in Exhibit 11? Is that made a part of the second one?

The Court: Isn't that a question of fact for the jury to determine, counsel?

Mr. McEachen: I just wanted to ask how it is transcribed.

The Witness: Transcribed where?

Mr. McEachen: I will withdraw the question.

Q. (By Mr. McEachen): As you familiar with the transmission of messages by wire to Canada?

The Court: Just a moment. I don't think that is material. We are only interested in the telegram to Mexico City.

(Testimony of M. G. McGee.)

Talking about these circuits, Mr. Witness, the circuits run from Los Angeles, across Arizona and New Mexico into Texas, is that correct?

The Witness: That is right.

Mr. Matthews: I move to strike that, your Honor, on the ground that we object to your question on the ground it calls for a conclusion of the witness unless he is physically aware of that fact.

The Court: Do you know that to be a fact?

The Witness: Well, I haven't traced them down, no, sir, but that is—we have what we call wire charts and, or a blue print in other words, showing the routing of the circuits and according to the blue prints and charts that is the way the circuits run.

The Court: Objection overruled.

Q. (By Mr. McEachen): And would you describe the continuity of the circuits from San Antonio on?

A. Well, the wires or the cables go right south of San Antonio, down to Laredo about 150 miles, on the poles and there at Laredo they go over the bridge across the Nueva Laredo and then they connect with the Mexican government lines [254] and I don't know how they route them down through Mexico. I am not familiar with that.

Q. Whereabouts, Mr. McGee, would you say the Western Union lines connect with the Mexican government lines?

A. Well, for all practical and technical purposes the boundary is in the middle of the bridge, is in

(Testimony of M. G. McGee.)

the middle of the Rio Grande river and that is where they connect.

Q. Now, is that a continuous line directly through there?

A. It is a continuous line without a break.

They had a flood down there about two years ago and washed the bridge away and our wires were 55 feet above the bridge and it washed the wires away, too, and as the waters were going down, why, we, rather than wait for it to get all the way down we got the Air Force to take a helicopter and fly the wires across there to the Mexican side and there we furnished all the material and technical ability to reinstall the circuit and billed the Mexican government for their pro-rata part of it.

Q. Would you describe the stops that you mentioned at Dallas and San Antonio in the transmission of messages to Mexico City as a relay?

Mr. Abbott: Object. The witness has exactly described what happens there. That is certainly more significant than a conclusionary term that we would apply. He said exactly [255] what happened. He mentioned the perforated tape, the taking off the transcription of the message to the blank and placing it on a new tape and whether we call it "relay" or some other word is immaterial in view of the details we have.

The Court: I will let him answer the question.

The Witness: Whenever there is a manual or retransmission of a telegram—from the start—in other words the telegram is put down in front of an



(Testimony of M. G. McGee.)

operator to send. That is the original sending or relay. In this instance it was considered a relay.

Mr. McEachen: No further questions.

Mr. Abbott: No further questions.

The Court: Is that all?

Mr. Abbott: Yes, your Honor. May counsel approach the bench?

The Court: Yes.

(The following proceedings were had at the bench and without the hearing of the jury:)

Mr. Abbott: This is our last witness just concluded, Judge, and there is just the matter of offering in evidence certain documents which have been marked for identification and not as yet admitted.

Mr. McEachen: I have a copy of your chart here so we can follow it.

Mr. Abbott: There are four exhibits marked for [256] identification and not in evidence yet. They come under the same general head. Those are Exhibits 5, a telegram to the Pommers from Walters, Exhibit 6, an envelope to Walters showing it was sent or postmarked at Los Angeles November 30th and some weeks later returned marked "unclaimed."

Then there is a telegram to the Thadens at San Antonio by a person signing his name as Hurst and Exhibit 10, a telegram from the person signing as Hurst to Thadens in Seattle.

Now, those four documents, your Honor, are all what is generally called a "cool-off" or "lulling messages."

They are designed on their face to advise the vic-

tims in such fashion that the victims will not protest to the authorities or at least will delay their protest.

Mr. McEachen: Are you referring to the witnesses in connection with other offenses?

Mr. Abbott: Both. Two of the documents relate to the Pommers and two to the Thadens.

Mr. McEachen: Let us separate them.

Mr. Abbott: We have a case directly in point under this very statute.

The Court: Just a moment. I am going to have to read your authorities.

Mr. Abbott: This is *Wiltsey vs. United States*, 22 Fed. 2d, 600. [257]

The head-note says:

“Telegrams which were lulling telegrams sent for the purpose of conveying assurances to victims of fraud and of preventing on their part action which might have interfered with carrying on the scheme, were sufficient to be considered as evidence of violation of this Section prohibiting fraud by wire, radio or telegram even though such telegrams were sent after the fraud was perpetrated.”

Now, that case in turn is based——

The Court: Was there any review by certiorari on that case?

Mr. Abbott: No indication of any application to the Supreme Court, your Honor.

The Court: I am going to admit them. I am going to admit this, too, 7 and 7-A in evidence.

(The exhibits referred to, marked Plaintiff's Exhibits 7 and 7-A, were received in evidence.)

Mr. Abbott: Let me indicate by number all of the exhibits being offered.

The Court: You may have your objection.

Mr. McEachen: We may have our objection on all grounds——

The Court: All grounds you can think of.

Mr. Abbott: Let me state the numbers being offered: 5, 6, 9 and 10 are the communications which come under the [258] general category of lulling messages and 7 and 7-A which are the records from Mexico and the English translation of the record from Mexico.

The Court: Yes. As I understand you do not question the correctness of the translation?

Mr. McEachen: No, we don't question that.

Mr. Matthews: We don't question it.

Mr. Abbott: That is all.

I would like to read these documents if I am permitted, your Honor.

The Court: Pass them to the jury. You will have enough to say without reading them. Pass them to the jury and let them examine them.

Mr. Abbott: I can renew the offer.

The Court: Renew the offer and it will be understood they will be received subject to defendants' objections.

Mr. McEachen: I will object to the introduction into evidence of Exhibits 1 through 12 on the ground that the corpus delicti has not been established in this case. And also with respect to the defendant Jensen, as shown by his affidavit on file in connection with a motion to dismiss, that the court

lacks personal jurisdiction over the defendant Jensen.

The Court: Motion denied.

Mr. Abbott: I will stipulate, if counsel desires, your [259] Honor, that the objections he has just made will be deemed renewed as here stated at the time that I make the offer in the presence of the jury.

Mr. McEachen: And on the further ground that the evidence offered with respect to the wire from Los Angeles to the Hotel Reforma, Mexico City—

The Court: That goes into the same question, really, of your entire defense in the case—it isn't interstate because it went to a foreign nation.

Mr. McEachen: That is right, and that is the substance of my objection.

The Court: I take the position if it goes to a foreign nation or not, if it crosses a state line it is a message sent across a state line.

Mr. Matthews: The cases cited don't indicate that.

The Court: No, but that is the position I am taking. There are not too many cases on this section.

Mr. Matthews: That is true, but the case I cite I think upholds our position.

Mr. Abbott: I know of nothing in that case that is inconsistent with the court's ruling.

Mr. McEachen: However, I want to cite as authority here the cases that I have already cited in my brief on the motion to dismiss in connection with the proposition that the message is by nature

a foreign message and consequently does not come [260] within Section 1343 of Title 18.

The Court: You have only stated that about 14 times so far, counsel.

Mr. McEachen: I only do it out of caution, your Honor.

The Court: You must be trying to keep up with Mr. Abbott when it comes to caution.

Mr. McEachen: Mr. Abbott is a hard taskmaster for all of us.

The Court: He is a perfectionist and you are trying to be even a greater perfectionist. You have made your record and I am sure it is well protected. We will proceed.

(The following proceedings were had in the presence and hearing of the jury:)

The Court: You may proceed.

Mr. Abbott: At this time the Government offers in evidence Exhibits 5, 6, 9 and 10 and 7 and 7-A.

The Court: They will be admitted subject to the objections heretofore made by counsel for the defendants.

(The exhibits referred to, marked Plaintiff's Exhibits 6, 7, 7-A, 9 and 10, were received in evidence.)

Mr. Abbott: I believe, your Honor, that there at this time no Government exhibits marked for identification but not admitted in evidence and I will ask that the clerk confirm that.

The Clerk: That is correct. [261]

Mr. Abbott: The Government rests, your Honor.

(Government rests.)

The Court: You may proceed.

Mr. McEachen: This is the proper time, if your Honor please, to make a motion under Rule 29-C of the Federal Rules of Criminal Procedure.

I believe I can accommodate both the court and jury by just one moment, if your Honor please. May we ask that the jury be withdrawn from the courtroom?

The Court: Approach the bench. I don't like for the jury to climb up and down these stairs any more than is necessary.

(The following proceedings were had at the bench without the hearing of the jury:)

Mr. Matthews: Make your motion and I will make the argument.

The Court: I am not going to listen to an argument. I know what the motion is and it will be denied. I simply want you to state your motion.

Mr. McEachen: At this time we move for a judgment of acquittal under Rule 29-C in the Federal Rules of Criminal Procedure.

This motion is based—strike that, Mr. Reporter. This motion is made on the basis of the previous motions to dismiss which are on file in the records of this court, including the [262] motion to dismiss on the grounds that the alleged offense is not within the statute, Title 18.

The evidence indicates that the message emanated as Los Angeles, which was the origin of that message and at that point designated for a destination in Mexico City and on that basis, due to the fact that the statute is silent with respect to—due to the

fact that the statute itself refers only to Interstate transmissions whereas——

The Court: Interstate you mean?

Mr. McEachen: Interstate, yes, your Honor. The Communications Act defines both interstate and foreign transmissions and therefore it appears obvious that Congress intended not to include foreign transmissions within the statute and thus being by its nature a foreign message as indicated by the cases cited in defendants' motion to dismiss, therefore we take the position that the Government has not made out a case under the statute.

The Court: Well, so I may be thoroughly understood on the record, I feel that any message that crosses state lines comes within the purview of the statute even if there was a direct wire between here and Mexico City. If the wire crossed a state line it was in interstate commerce and I think that was the purpose of the Act. The purpose of the Act was to prevent fraud by use of facilities of this type.

Even if the telegram was to France or Mexico City if they [263] used our wires and those wires crossed state lines—that is the messages crossed state lines the statute is intended to cover it.

Mr. Matthews: Now, your Honor, the defendants in this case——

The Court: I don't want to listen to an argument, gentlemen.

Mr. Matthews: I want this position that we take on the record.

The defendants in this case move for a judgment of acquittal on the grounds that there is no corpus

delicti of the offense established in connection with one of the main elements, namely the fraud within the confines of the United States of America, and there is no overt act of any kind committed by the defendants within the confines of the United States of America.

I am pointing out to the court on the basis of the Government's theory that we have a conspiracy here——

The Court: You have a conspiracy as far as the admissibility of evidence is concerned but we don't have a conspiracy charge.

Mr. Matthews: That is correct.

The Court: The motions will be denied and when you have finished your case you can make a similar motion, and I presume if there is a conviction that there will be a motion [264] for a new trial based on the same grounds. [265]

\* \* \* \* \*

Los Angeles, California, May 23, 1956.

The Court: Stipulate the jury is present and in the jury box?

Mr. Abbott: So stipulated, your Honor.

Mr. McEachen: Yes, your Honor.

The Court: You may proceed with your opening argument.

Mr. McEachen: May we approach the bench, your Honor?

(The following proceedings were had at the bench and without the hearing of the jury):

Mr. McEachen: At this point, if your Honor please, it becomes incumbent upon me as attorney



for the defendants to renew the motion for judgment of acquittal, which will be based upon the motions previously made, the arguments which have been submitted and in connection with those motions, and also the affidavits submitted and on the grounds which I have previously raised in connection with the motions.

Now, in connection with the instructions do you want to make the record on those at this time?

The Court: According to the Circuit Court of Appeals that motion has to be made after I instruct the jury.

I have the instructions before me that you have taken exception to.

Following my instructing the jury you may approach the bench and give to the reporter the instructions you objected [268] to and which I have here before me.

Mr. McEachen: All right, your Honor.

The Court: Motion denied. You may proceed.

\* \* \* \* \*

The Court: A telegram is sent by means of interstate wire as those words are used in the statute and in the indictment, which I have read to you, if sent by a wire which crosses state lines, whatever may be its destination. [311]

\* \* \* \* \*

The Court: Let us have your objections to the instructions.

Mr. McEachen: The objection to an instruction given, which is listed as Government's instruction 10, "a telegram is sent by means of interstate wire,"

as those words are used in the statute and in the indictment which I have read to you—"if sent by a wire which crosses the state lines, whatever may be its destination," that is objected to as not [320] being a proper statement of the law as indicated by the motions which have been filed, including the motion to dismiss and the argument made at the close of the Government's case under Rule 29-C, in that they do not properly present the law with respect to interstate and foreign communications, and specifically it is our position that the wire as transmitted from Los Angeles, its point of origin, was in essence a foreign wire and as such in foreign commerce and consequently not within the purview of Section 1343 of the United States Code.

I also make objection at this time under Rule 30, Federal Rules of Criminal Procedure, of the court's refusal to give an instruction which I will number "No. 2," which is as follows:

"The indictment refers to transmittal by interstate or foreign wire.

"Interstate transmission means transmission from any state, territory or possession of the United States to any other state, territory or possession of the United States.

"Foreign transmission means transmission from or to any place in the United States to or from a foreign country."

That is part of the Communications Act of 1934 as amended, Title 47, U. S. Code Section 153 of which Title 18, [321] Section 1343 is a part and therefore these definitions as a part of the Com-

munications Act should be given in order to properly define the nature of interstate transmission by wire, and also a foreign transmission by wire and that they are two distinct matters.

Now, what I will designate as defendants' proposed instruction No. 4, which because it is short I will read:

"When the communication by wire shows the destination thereof at its point of origin, that fact is determinative of its character as an interstate or foreign communication."

I cite the case of *Powell vs. United States*. 112 F. 2d, 764 as authority for that proposition.

Briefly, that case holds that it is the nature of the document at its point of origin which determines its nature as an interstate or foreign transmission or communication.

Defendants' proposed instruction No. 5 which reads as follows:

"Interstate commerce does not include foreign commerce, unless Congress by definition for the purpose of a particular statute includes them both in a single expression."

I cite *Border Pipe Lining Co. vs. Federal Power Commission*, 151 F. 2d, 149, in which case a definite distinction is made between interstate and foreign commerce and that [322] they are mutually exclusive concepts and repeating the statement made in connection with the previous case, in that it is the nature of the transmission at the point of origin which determines whether or not it is an interstate or foreign transmission. [323] \* \* \* \* \*

Los Angeles, California, Friday, May 25, 1956.

The Court: You may proceed.

The Clerk: 24,808 and 24,950, United States of America vs. Michael Victor Schlising, Emil Wentz and William Bering Jensen for sentence in the matter of Emil Wentz and William Bering Jensen.

The Court: You may proceed.

Mr. McEachen: Your Honor, I have given a copy of each of these motions to the United States Attorney, a motion for a new trial and a motion in arrest of judgment which I am filing in duplicate at this time, if your Honor please.

Mr. Abbott: I will acknowledge receipt this morning of each of those copies, your Honor.

Mr. McEachen: These motions are made upon grounds heretofore stated.

There is nothing new which appears in the motions. They are based upon the basic differences that we have already covered many times during the course of the trial, preceding the trial and on pretrial motions.

You did suggest at the pretrial motion filed on behalf of the defendant Jensen in connection with the personal jurisdiction element that you would make a determination of that after the trial was over and I assume it would be proper to consider that at this time. [339]

You originally denied the motion and I would think it would come up properly in connection with the motion in arrest of judgment because that goes to matters involving jurisdiction.

The Court: You have nothing new to offer then that you haven't already presented to the court?

Mr. McEachen: That is correct, your Honor, except that I could argue the point if your Honor would be interested in it.

The Court: I think you have argued it sufficiently and I hope and think your record is protected on that point. I am satisfied it is fully presented and if they are the same points you have made heretofore I understand them.

Mr. McEachen: Basically, your Honor.

The Court: It is basically the same proposition, that it did not come within the statute here?

Mr. McEachen: Yes, the element that I mentioned—that is that the matter of personal jurisdiction did not come within the jurisdiction of the court.

There were two underlying features of that. One is when a defendant is forced into this country he is denied any freedom of choice as to any legal remedy he might be able to pursue and, No. 2, it is a violation of, a technical violation of the laws of the United States—actually it is a kidnap.

The Court: Only recently our circuit court has held that [340] when a person is before the court, the court is not concerned with how he got there.

Mr. McEachen: That is true, but there is this other theory that was advanced in the Rosenberg case. The court didn't decide the issue but it did state that the motion was not made timely.

The Court: You made your motion before the trial so that question is not before us.

Mr. McEachen: Yes, your Honor.

The Court: All the court knows about it is what is set forth in the affidavits attached to the motion. I presume the Mexican government had a right to deport these men if they wanted to. We are not concerned with their methods of deportation.

Mr. McEachen: That is true, but the manner in which they were turned over to the agents of the United States Government make it appear as though they were working together.

The Court: That may be true, but questions have been raised here which I think call for the guidance of the circuit court.

I feel that this court does have jurisdiction of the defendants and I also feel that this offense comes within Section 1343.

I not only feel that way but Judge Mathes originally ruled on the motion to dismiss when that point was presented [341] and I have reviewed the points and authorities; I have read the cases and have given it considerable thought and I am in accord with his rulings. I think the statute was intended to cover situations such as we have here.

I realize that if the message had gone from here to Tijuana, we will say, we might have a different problem, but this message here involved did travel over interstate communication lines before it ever entered the Republic of Mexico and I feel this statute covers it.

As I told you before I will not deny them bail pending appeal because I feel there is a substantial question. I might say I do not feel there is a sub-

stantial question as much as I feel that when able counsel, and I wish to compliment both of you and Mr. Matthews, who is not here today, for the very courteous and fine manner in which you tried this case.

I felt that you co-operated with the court in expediting the matter. You presented the matter and I am satisfied you are serious in your position. Although I don't agree with you I feel that that in itself may raise a substantial question because it is easy to be wrong and when able counsel argue and present seriously a question on behalf of your clients I feel I should take that into consideration. I have absolute confidence in your sincerity and I say there may be a likelihood that I may be wrong.

For those reasons I am going to hold that there is a substantial question when it comes to the matter of appeal, but as far as I am concerned I feel confident that the offense as described in the testimony here is covered by Section 1343.

Is there anything more I can say?

Mr. McEachen: No, I appreciate your Honor's remarks, I do sincerely.

The Court: I am going to grant bail in this matter because I feel counsel have been sincere in presenting this point.

I realize there may be a different ruling from that which I have made here in this court and I think it is a proper case for a ruling by the Circuit Court of Appeals.

Ordinarily I would say there was no probable cause but in this case I am going to find there is

because I feel the case has been so sincerely presented and the points have been so sincerely urged and it is so easy for a court to be wrong. I appreciate that. I have been wrong so many times when I felt confident that it raises a question in my own mind when sincere counsel present a point that they sincerely believe in. It creates a reasonable doubt in my mind as to my own views. At least I feel it is a case in which it is proper to permit the defendants to be released on bail pending appeal. However, I have studied this section since the trial. [343] I have given it a lot of thought and up to now I see no reason at all for me to change my views. I do not mean that I may not be mistaken.

Mr. McEachen: I hope that I have placed the position that I take exactly in the manner that I should have. I know there are other cases that I could have presented but they would have been cumulative on the point.

The Court: Both you and Mr. Abbott have researched the case and this problem. It is virtually a new statute, as statutes go. I have made an independent research and I haven't found anything that is stronger than the cases you have presented.

I presume the motion for a new trial is based on the same grounds as your motion in arrest of judgment.

If the court has jurisdiction of this offense you don't question the sufficiency of the evidence, do you?

Mr. McEachen: Basically, your Honor has stated my position in that regard.



The Court: It is not your contention that the evidence is insufficient. The question is whether the statute covers the offense alleged.

Mr. McEachen: That is the underlying point.

The Court: That is the point.

Mr. McEachen: It underlies every objection that I raise, your Honor. [344]

The Court: Well, the motion for a stay and the motion for a new trial will be denied.

[Endorsed]: Filed July 18, 1956. [345]

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[Endorsed]: No. 15248. United States Court of Appeals for the Ninth Circuit. Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 22, 1956.

Docketed: August 31, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals  
For the Ninth Circuit

No. 15248

EMIL WENTZ, et al.,

v.

UNITED STATES OF AMERICA

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD UNDER RULE 17,  
SUBSECTION 6

Comes now the Appellants in the above entitled cause and pursuant to Rule 17, Subsection 6, of the Rules of the United States Court of Appeals for the Ninth Circuit and designate from the Reporter's Transcript of Proceedings the following record, together with a statement of points upon which they intend to rely.

Designation of Record

The complete transcript of the record prepared by the Clerk of the United States District Court.

Reporter's Transcript of Proceedings of May 14, 1956.

Reporter's Transcript of Proceedings of May 21, 1956, pages 5, 6 and 7 to line 7.

Reporter's Transcript of Proceedings of May 22, 1956, pages 211 to 219, line 4 inclusive.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 240, line 6 to page 265, line 1 inclusive.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 268 to 269, line 3 inclusive.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 311, lines 5 to 8 inclusive.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 320, line 18 to page 323, line 5.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 339, line 1 to page 345, line 2 inclusive.

### Statement of Points

Appellants will rely upon the following points:

The Government did not prove an offense against the laws of the United States; Title 18, Section 1343 of the United States Code applies to interstate communication only. The Government relied upon a foreign communication to prove its case.

The District Court erred in denying:

1. Defendants' Motion to Dismiss;
2. Defendants' Motion for a Bill of Particulars;
3. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction;
4. Defendants' Motion for a New Trial;
5. Defendants' Motion in the Arrest of Judgment;
6. Defendants' Motion for Judgment of Acquittal.

The District Court erred in refusing defendants' proposed instructions Numbers 2, 4 and 5, and in giving Government's proposed instruction number 10 (These instructions related to the nature of the communication as interstate or foreign.)

The District Court erred in admitting into evi-

dence Exhibit No. 11, a telegram from Los Angeles, California to Mexico City, District Federal.

Respectfully submitted,

/s/ ANGUS D. McEACHEN,

Attorney for Appellants

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 31, 1956. Paul P. O'Brien, Clerk.

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[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD,  
RULE 17, SUBSECTION 6

Comes now the Appellee, United States of America, and pursuant to Rule 17, Subsection 6, of the Rules of the United States Court of Appeals for the Ninth Circuit, designates from the Reporter's Transcript of Proceedings the following testimony, which is material to the questions presented by Appellants' Statement of Points and Designation of Record under Rule 17, Subsection 6:

Reporter's Transcript of Proceedings of May 21, 1956, Page 7, Line 8, through Page 8, Line 24.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney

/s/ LOUIS LEE ABBOTT,

Assistant U. S. Attorney,

Chief, Criminal Division

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept 11, 1956. Paul P. O'Brien, Clerk.

No. 15248

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

EMIL WENTZ and WILLIAM BERING JENSEN,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

Appeal From the United States District Court for the  
Southern District of California, Central Division.

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## BRIEF OF APPELLANTS.

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ANGUS D. McEACHEN,

510 South Spring Street,  
Los Angeles 13, California,

*Attorney for Appellants.*

FILED

DEC 15 1956

PAUL P. O'BRIEN, CLERK



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No. 15248

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

EMIL WENTZ and WILLIAM BERING JENSEN,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

Appeal From the United States District Court for the  
Southern District of California, Central Division.

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## BRIEF OF APPELLANTS.

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### I.

#### JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction in the District Court for the Southern District of California, Central Division. The Appellants were charged in the indictment with having violated the laws of the United States, to-wit, Section 1343, Title 18, U. S. C. A., namely fraud by interstate and foreign wire, in that they devised and intended to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made and that on November 22, 1955, the defendants, for the purpose of executing the

scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from Los Angeles to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico [R. 3-6].

Pretrial motions were heard and denied [R. 10-20]. All defendants entered not guilty pleas. Appellants Wentz and Jensen were tried by jury and found guilty as charged [R. 27-28] and thereafter were sentenced on May 25, 1956, to five years and \$1,000.00 fine each [R. 31-32].

Notice of Appeal was filed on May 25, 1956 [R. 33-34].

The District Court had jurisdiction to try the case by virtue of the provisions of Section 3231, Title 18, U. S. C. A.

This Court has jurisdiction of the Appeal by virtue of the provisions of Sections 1291-1294, Title 28, U. S. C. A.

## II.

### STATEMENT OF CASE AND QUESTIONS INVOLVED.

#### 1. Facts and Circumstances.

From on or about the 14th day of November, 1955, and continuing to on or about the 29th day of November, 1955, the defendants Michael Victor Schlising, Emil Wentz and William Bering Jensen devised, and intended to devise, a scheme and artifice to defraud Frank X. Pommer and Selma H. Pommer and to obtain money from the said Frank X. Pommer and Selma H. Pommer by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the name of the defendant

Michael Victor Schlising was Karl Ober; that the name of the defendant Emil Wentz was James E. Walters; that an organization known as the Metropolitan Company owned all of the horses running at race tracks; that the defendant Emil Wentz was employed by the said Metropolitan Company as "confidence man" engaged in betting money on "fixed" horse races; that the defendant Emil Wentz was using confidential information received by him from the said Metropolitan Company to make bets on fixed horse (2) races for his own account; that the defendant Emil Wentz would pay to the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising 25% of money won by him from bets so made if the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising would place the said bets for him; that the surname of the defendant William Bering Jensen was Johnsen; that the defendant William Bering Jensen was president of the American Club, Mexico, District Federal, Republic of Mexico, for a period of time including November 19 through November 24, 1955; that the said American Club was engaged in the business of accepting wagers on horse races; that the defendant Emil Wentz had, on November 19, 1955, made a bet on a horse race with the American Club in the sum of \$101,500.00, consisting of \$1,500.00 in cash and a check for \$100,000.00; that as a result of the said bet the defendant Emil Wentz had won \$203,000.00; that the defendant William Bering Jensen, as president of the said American Club, would pay \$200,000.00 of its funds to the defendant Emil Wentz on condition that the defendant Emil Wentz show to the defendant William Bering Jensen \$100,000.00 in cash as evidence that the said check in the amount of \$100,000.00

would have been collectible if the wager in which it was used had been lost by the defendant Emil Wentz; that if the said Frank X. Pommer and Selma H. Pommer would advance \$24,000.00 in cash to be displayed to the defendant William Bering Jensen in combination with \$76,000.00 in cash to be furnished by defendants Michael Victor Schlising and Emil Wentz, said \$24,000.00 would immediately thereafter be returned to the said Frank X. Pommer and Selma H. Pommer, together with an additional \$25,000.00; that the defendant Michael Victor Schlising had displayed \$100,000.00 to the defendant William Bering Jensen, and had received from the defendant William Bering Jensen an additional \$200,000.00 in cash to be delivered to the defendant Emil Wentz; that the defendant Michael Victor Schlising thereafter bet and lost \$200,000.00 (3) purportedly delivered by the defendant William Bering Jensen to him and all of the money purportedly displayed to the defendant William Bering Jensen, including the said \$24,000.00 in cash delivered to the defendant Emil Wentz by the said Frank X. Pommer and Selma H. Pommer; and

On or about November 22, 1955, defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen, for the purpose of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico.

The scheme set out in the indictment took place in Mexico City, D. F. The signal and sound referred to

therein was a wire transmitted by Western Union. The wire originated at Los Angeles. Its destination was Mexico City, D. F.

The wire was transmitted by Western Union from Los Angeles to Mexico City by relay through Dallas and San Antonio, Texas [R. 82]. This is the normal routing of telegrams from Los Angeles to Mexico City [R. 70].

## **2. Questions Involved and How Raised.**

### **A. Is the Message Which the Government Relied Upon to Prove Its Case an Interstate or a Foreign Communication or Transmission?**

This question was raised by:

1. Defendants' Motion to Dismiss;
2. Defendants' Motion for Bill of Particulars;
3. Defendants' Motion for Judgment of Acquittal;
4. Defendants' Motion in Arrest of Judgment;
5. Defendants' Motion for a New Trial;
6. Objections to Introduction of Evidence;
7. Objections to Instructions Given;
8. Objections to Court's refusal to instruct as requested by counsel for defendants.

### **B. Did the District Court Lack Personal Jurisdiction Over Appellant Jensen?**

This question was raised by:

1. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction;
2. Defendants' Motion in Arrest of Judgment.

### III. SPECIFICATIONS OF ERROR.

(a) That the court erred in denying Defendants' Motion to Dismiss [R. 13, 55].

(b) That the court erred in denying Defendants' Motion for a Bill of Particulars [R. 13, 57].

(c) That the court erred in denying Defendants' Motion to Dismiss for Lack of Personal Jurisdiction [R. 19].

(d) That the court erred in denying Defendants' Motion for a New Trial [R. 99].

(e) That the court erred in denying Defendants' Motion in Arrest of Judgment [R. 99, 29].

(f) That the court erred in denying Defendants' Motion for Judgment of Acquittal [R. 25].

(g) That the court erred in refusing defendants' proposed Instruction No. 2, which is as follows:

“The indictment refers to transmittal by interstate or foreign wire.

“Interstate transmission means transmission from any state, territory or possession of the United States to any other state, territory or possession of the United States.

“Foreign transmission means transmission from or to any place in the United States to or from a foreign country.”

That is part of the Communications Act of 1934 as amended, Title 47, United States Code, Section 153, of which Title 18 (321), Section 1343, is a part and therefore these definitions as a part of the Communications Act should be given in order to properly define the nature

of interstate transmission by wire, and also a foreign transmission by wire and that they are two distinct matters [R. 92-93].

(h) That the court erred in refusing defendants' proposed instruction No. 4 which is as follows:

"When the communication by wire shows the destination thereof at its point of origin, that fact is determinative of its character as an interstate or foreign communication." [R. 93.]

(i) That the court erred in refusing defendants' proposed instruction No. 5 which is as follows:

"Interstate commerce does not include foreign commerce, unless Congress by definition for the purpose of a particular statute includes them both in a single expression." [R. 93.]

(j) That the court erred in giving Government's proposed instruction No. 10 which is as follows:

"A telegram is sent by means of interstate wire," as those words are used in the statute and in the indictment which I have read to you—"if sent by a wire which crosses the state lines, whatever may be its destination" [R. 91-92].

(k) The Court erred in admitting into evidence Exhibit 11, a telegram from Los Angeles, California to Mexico City, District Federal.

IV.  
ARGUMENT.

1. The Government Relied on a Foreign Message to  
Prove Its Case.

Title 18, Section 1343, United States Code—Fraud by  
Wire:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined, etc. \* \* \*

The aforecited section is otherwise known as Section 18(a) of the Communications Act Amendments, 1952, 66 Stat. 722. These amendments are to the Communications Act of 1934 found in Title 47 of the United States Code, Section 53, of the Communications Act, 1934, Title 47, United States Code, Section 153, is as follows:

Definitions (e):

“Interstate communication or interstate transmission means, communication or transmission: (1) from any state, territory or possession of the United States \* \* \* to any other (6) State, territory or possession of the United States \* \* \* (f) Foreign communication or foreign transmission means communication or transmission from or to any place in the United States to or from a foreign country.”



The indictment recites in part as follows:

“On or about November 22, 1955 defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen, for the purposes of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico.”

While the Communications Act defines foreign communication and transmission, Section 18(a) of the Communications Act Amendments, 1952, 66 Stat. 722, 18 U. S. C. 1343, refers only to interstate communications. It was the theory of the government and the lower court that a telegram which crosses state lines is interstate, whatever may be its destination. This is not the law. This theory violates a fundamental concept under the Commerce Clause.

*U. S. Const.*, Art. I, Sec. 8, Cl. 3.

Foreign commerce is a branch of the nation's unlimited power over foreign relations. It clothes Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the states. The law which would be necessary and proper with respect to interstate commerce, would not be necessary or proper in the respect to foreign commerce.

In the field of foreign relations the national government is completely sovereign and the power to regulate

commerce with foreign nations is but a branch of this sovereign power. The power to regulate commerce among the states is, on the other hand, not a sovereign power except for purposes of commercial advantage, in other respects it is confronted at every turn by the police power of the state, and hence requires to be defined in relation to the known and frequently reiterated objectives of that power.

CONSTITUTION OF THE UNITED STATES OF AMERICA,  
UNITED STATES GOVERNMENT PRINTING OFFICE,  
1953.

The fundamental weakness of the government's position was recognized by the Attorney General in his letter of March 30, 1956, to the Speaker of the House of Representatives, Page 4106, *U. S. Congressional and Administrative News*, No. 13, Aug. 5, 1956:

“March 30, 1956.

“The Speaker,

House of Representatives,

Washington, D. C.

“Dear Mr. Speaker: Section 18(a) of the Communications Act Amendments, 1952 (66 Stat. 711, 722) amended title 18 of the United States Code by adding a new section 1343 as follows:

“‘Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of (interstate) wire, radio or television communication, any writings, signs, signals, pictures, or sounds for the pur-

pose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than 5 years, or both.'

"Last year a case arose in which it was alleged that the subject in the execution of a scheme to defraud used the telephone, calling from a point in Mexico to Los Angeles, Calif. Because of the limitation in the statute to frauds involving 'interstate' wire, radio, or television communication it was concluded that the telephone call from Mexico, being not an interstate communication but rather a foreign communication, was not covered by the section.

"This case demonstrates the need for amending the statute so that it will reach not only interstate communications but foreign communications as well. If so amended, the statute will cover, for example, telephone calls from Canada made by fraudulent stock promoters to victims residing in the United States. Furthermore, the amendment would remove any doubt as to the applicability of the statute to a communication between a State and a Territory or between a State and the District of Columbia.

"A draft of a bill to accomplish the suggested amendment is enclosed for your consideration and appropriate action.

"The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.

"Sincerely,

....., Attorney General."

On July 11, 1956, Public Law 688 was enacted by Congress Amending Section 1343 of Title 18, United States Code as follows: Page 3815 of *U. S. Code Congressional and Administrative News*, No. 13, August 5, 1956.

“Section 1343 of title 18, United States Code is amended to read as follows:

§1343. Fraud by wire, radio, or television.

“Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

“Approved July 11, 1956.”

It was stated at page 4106 of *U. S. Code Congressional and Administrative News*, No. 13, August 5, 1956, as follows:

“This bill is designed to close a loophole in the present law, which limits the prosecution of frauds involving wire, radio, and television communication to interstate transactions only. It would extend this coverage to foreign communications as well.”

It is conceded that there was substantial evidence of a scheme to defraud within the meaning of the statute.

What is controverted is that the Appellants caused to be used an interstate wire in the execution thereof.

The wire originated at Los Angeles, California on November 22, 1955, and the destination indicated thereon at that time and place was Hotel Reforma, Mexico, D. F., Mexico [R. 48-49].

In *Border Pipe Lining Co. v. Federal Power Commission*, 171 F. 2d 149 (1948), there was a petition to review an order of the Federal Power Commission. The petitioners were exporters of natural gas to Mexico under permit from the Federal Power Commission. Petitioners output of natural gas went to an industrial consumer who transported the gas to Mexico and used it there. Petitioners had complied with the export requirements of the Act, but not the interstate requirements. The question before the court was whether or not petitioners were engaged in interstate commerce within the provisions of the Natural Gas Act. Setting aside the order, the court held that petitioners were not engaged in interstate commerce within the provisions of the Act. In so doing the court stated as follows:

“Interstate commerce does not include foreign commerce, unless Congress by definition for the purpose of a particular statute includes them both in a single expression.”

Page 150 of the opinion sets out examples of the various definitions outlined by Congress.

“The prime responsibility for making statutory meaning clear is on the Congress. It is bad for the court to twist strange results out of otherwise understood expressions of the legislature.”

In *Powell v. United States*, 112 F. 2d 764 (4th Cir., 1940), the defendants were indicted for failure to observe their published tariffs under the Elkins Act, 49 U. S. C. 41. In this case it was argued by the Government that the shipment was not in foreign commerce. The shipping order involved showed on its face "for export," the Court at page 767 of the Opinion stated:

"There can be no question but that the shipment was intended at its inception as a movement in foreign commerce. . . . There was an original and continuing intention on the part of those having control of the shipment that unless rejected, it should proceed to a foreign destination and this, we think was determinative of its character."

The defendants are charged in the indictment with transmission by interstate and foreign wire a signal and sound from Los Angeles, California, through points in Texas to Mexico.

The language used imparts continuity. It is obvious that there is but one message and that message originated at Los Angeles and was from the outset a foreign message to the Republic of Mexico. As such it was not within the statute. The expression "thence" imparts continuity, that the following course is continuous with the one before it.

*Flagg v. Mason*, 141 Mass. 66, 6 N. E. 702.

In *State of Texas v. Anderson, Clayton & Co.*, 92 F. 2d 104, Cert. Den. 58 S. Ct. 265, 302 U. S. 747, the Court ruled:

"In determining whether a particular freight movement is interstate or foreign commerce, the intention existing when the movement started governs."

In *R. J. Reynolds Tobacco Co. v. Robertson*, 22 Fed. Supp. 187, Affd. 94 F. 2d 167, Cert. Den. 58 S. Ct. 944, 304 U. S. 563, the Court ruled:

"Cigarettes consigned to foreign customers assumed export status when they were delivered from warehouse to carrier, so as to bring the shipment under Federal control."

In *Branch v. Federal Trade Commission*, 141 F. 2d 31, a cease and desist order was issued by the Federal Trade Commission against petitioner who operated a correspondence school. He sent courses to students in foreign countries and insists that the Federal Trade Commission had no jurisdiction over his operation. The legislation involved covered both interstate and foreign commerce. The court held that the business dealings of petitioner with his customers in foreign countries is foreign commerce within the meaning of the Constitution and the Act.

In *Empresa Siderurgica v. Merced Co.*, 337 U. S. 154, at 157, the court stated:

"It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is the certainty that the goods are headed for their foreign destination and will not be diverted to domestic use."

## 2. The Court Lacked Personal Jurisdiction Over Appellant Jensen.

This point was raised in Appellants' Motion to Dismiss for Lack of Personal Jurisdiction [R. 15].

An affidavit was submitted by Jensen in connection with his Motion for the reason that he had been illegally abducted in Mexico City, Republic of Mexico, and taken from there to Laredo, Texas where he was delivered into the custody of the United States, thereby depriving him of the choice of entering the United States voluntarily [R. 17].

Jurisdiction over the person of Appellant Jensen was acquired in violation of laws of the United States and international agreement.

Jurisdiction of the person of a defendant cannot be acquired in violation of a federal statute. Personal jurisdiction of Appellant was acquired by the Federal Court through the illegal acts of Federal officers.

*McNabb v. United States*, 318 U. S. 332.

In the *McNabb* case the court held that a defendant could not be convicted on the basis of confession obtained by federal agents in violation of a federal statute. Appellant should have been restored the choice of entering the country voluntarily.

*United States v. Rosenberg, et al.*, 195 F. 2d 583 (C. A. 2).



3. The Court Erred in Refusing Appellants' Proposed Instructions Nos. 2, 4 and 5 [R. 92] and in Giving Instructions No. 10 [R. 91].

The indictment itself refers to transmittal by interstate and foreign wire, yet the court refused to define these terms as set out in the act. In fact there was no instruction respecting foreign transmission by wire [R. 92].

Proposed Instructions Nos. 4 and 5 merely stated the law on the subject matters contained therein as pointed out earlier in this argument [R. 93].

### Conclusion.

The judgment of the lower court should be reversed.

Dated: Los Angeles, California, December 12, 1956.

Respectfully submitted,

ANGUS D. McEACHEN,

*Attorney for Appellants.*



No. 15248

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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EMIL WENTZ and WILLIAM BERING JENSEN,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

---

LAUGHLIN E. WATERS,

*United States Attorney,*

LOUIS LEE ABBOTT,

*Assistant United States Attorney,*

*Chief, Criminal Division,*

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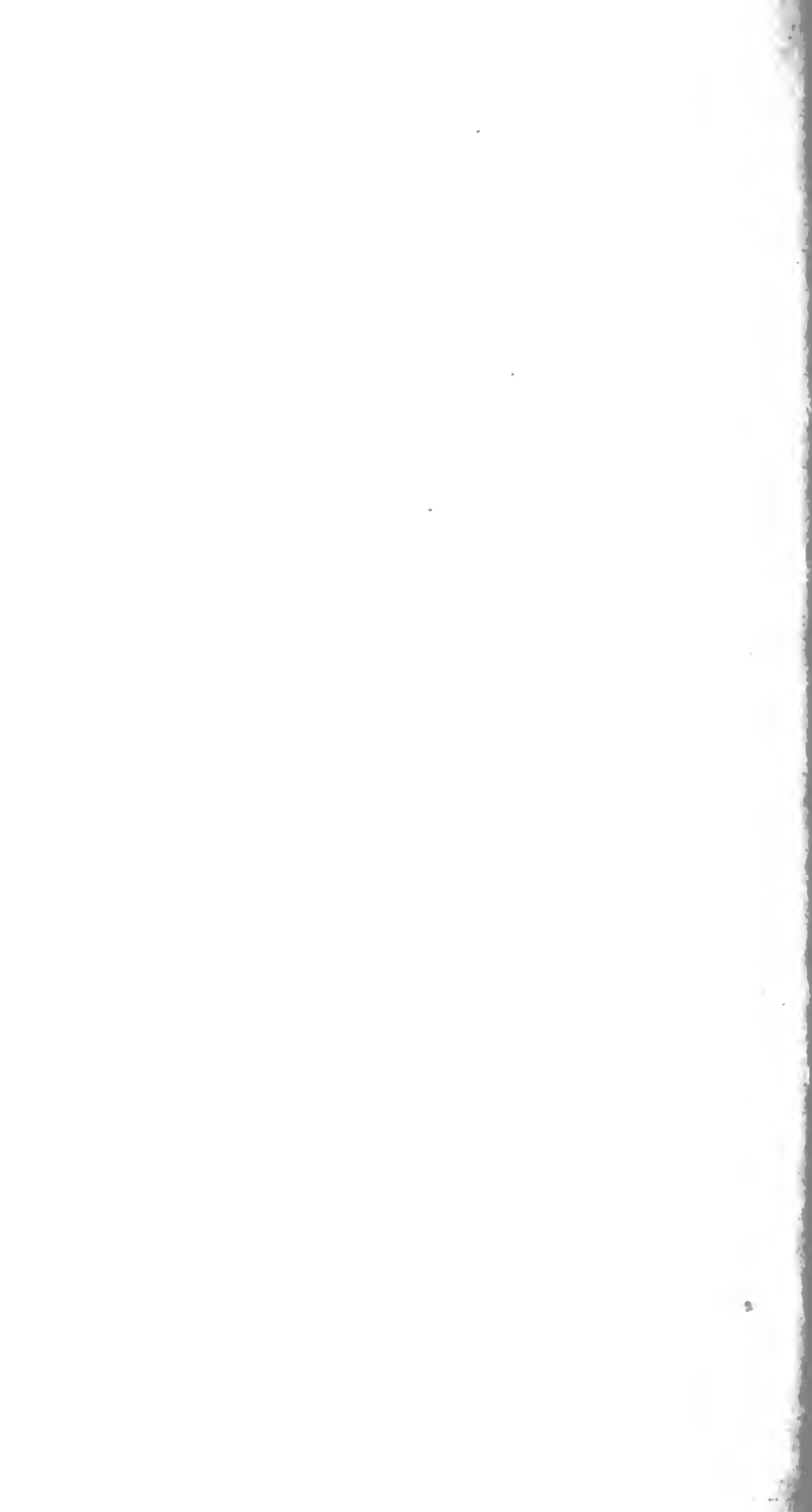
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No. 15248  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

EMIL WENTZ and WILLIAM BERING JENSEN,  
*Appellants,*

*vs.*

UNITED STATES OF AMERICA,  
*Appellee.*

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**APPELLEE'S BRIEF.**

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**Jurisdictional Statement.**

This is an appeal from a judgment of conviction in the United States District Court for the Southern District of California, Central Division. The jurisdiction of the District Court arose under Title 18, United States Code, Section 1343 (Fraud by Wire, Radio or Television), July 16, 1952, Chapter 879, Section 18(a), 66 Stats. 722; and Title 18, United States Code, Section 3231, June 25, 1948, Chapter 645, 62 Stats. 826.

The prosecution was commenced by an Indictment which alleges in substance that the appellants and co-defendant Michael Victor Schlising devised, and intended to devise, a scheme and artifice to defraud and to obtain

money by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made, and that the said individuals, for the purpose of executing the scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from Los Angeles, California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, D. F., Republic of Mexico [Tr. 3-6].

The jurisdiction of this Court was invoked under the provisions of Title 28, United States Code, Sections 1291 and 1294, June 25, 1948, Chapter 646, 62 Stats. 929-930. Notice of appeal was filed on May 25, 1956 [Tr. 33-34].

### Statement of the Case.

#### A. Indictment and Pertinent Evidence.

Appellants do not question the sufficiency of the evidence to support the Indictment, and therefore have set out the allegations of the Indictment as the opening two paragraphs of their Statement of Case. Appellants then state, "The scheme set out in the indictment took place in Mexico City, D. F." There is no support in the record before this Court for that statement. Finally, appellants add a brief outline of facts relative to the "signal and sound" referred to in the Indictment.

In order to present a complete and somewhat more detailed statement of the case than appears in the appellant's Brief, we will also set out the Indictment verbatim, followed by a more comprehensive outline of the evidence

relative to the "signal and sound" there alleged. The Indictment reads:

"From on or about the 14th day of November, 1955, and continuing to on or about the 29th day of November, 1955, the defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen devised, and intended to devise, a scheme and artifice to defraud Frank X. Pommer and Selma H. Pommer and to obtain money from the said Frank X. Pommer and Selma H. Pommer by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the name of the defendant Michael Victor Schlising was Karl Ober; that the name of the defendant Emil Wentz was James E. Walters; that an organization known as the Metropolitan Company owned all of the horses running at race tracks; that the defendant Emil Wentz was employed by the said Metropolitan Company as 'confidence man' engaged in betting money on 'fixed' horse races; that the defendant Emil Wentz was using confidential information received by him from the said Metropolitan Company to make bets on fixed horse races for his own account; that the defendant Emil Wentz would pay to the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising 25% of moneys won by him from bets so made if the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising would place the said bets for him; that the surname of the defendant William Bering Jensen was Johansen; that the defendant William Bering Jensen was president of the American Club, Mexico, District Federal, Republic of Mexico, for a period of time including November 19 through November 24, 1955;

that the said American Club was engaged in the business of accepting wagers on horse races; that the defendant Emil Wentz had, on November 19, 1955, made a bet on a horse race with the American Club in the sum of \$101,500, consisting of \$1,500 in cash and a check for \$100,000; that as a result of the said bet the defendant Emil Wentz had won \$203,000; that the defendant William Bering Jensen, as president of the said American Club, would pay \$200,000 of its funds to the defendant Emil Wentz on condition that the defendant Emil Wentz show to the defendant William Bering Jensen \$100,000 in cash as evidence that the said check in the amount of \$100,000 would have been collectible if the wager in which it was used had been lost by the defendant Emil Wentz; that if the said Frank X. Pommer and Selma H. Pommer would advance \$24,000 in cash to be displayed to the defendant William Bering Jensen in combination with \$76,000 in cash to be furnished by defendants Michael Victor Schlising and Emil Wentz, said \$24,000 would immediately thereafter be returned to the said Frank X. Pommer and Selma H. Pommer, together with an additional \$25,000; that the defendant Michael Victor Schlising had displayed \$100,000 to the defendant William Bering Jensen, and had received from the defendant William Bering Jensen an additional \$200,000 in cash to be delivered to the defendant Emil Wentz; that the defendant Michael Victor Schlising thereafter bet and lost \$200,000 purportedly delivered by the defendant William Bering Jensen to him and all of the money purportedly displayed to the defendant William Bering Jensen, including the said \$24,000 in cash delivered to the defendant Emil Wentz by the said Frank X. Pommer and Selma H. Pommer; and

“On or about November 22, 1955 defendants Michael Victor Schlising, Emil Wentz, and William

Bering Jensen, for the purpose of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico.”

The words “signal and sound” in the Indictment in fact describe a Western Union Telegraph Company telegram which originated in Los Angeles, California, and bore a Mexico, D. F., Mexico, address [Tr. 48-49, 61-62, Exs. 11, 12]. There are no physical facilities for sending messages by wire from Los Angeles to Mexico City directly across the California-Mexico border [Tr. 63, 65]. In the ordinary course of business, Western Union messages originating in Los Angeles and addressed to Mexico City are sent to Dallas, Texas, and from Dallas to San Antonio, Texas, on Western Union lines situated entirely within the continental limits of the United States and passing through California, Arizona, New Mexico and Texas. Such messages are then retransmitted from San Antonio to Mexico City [Tr. 48-50, 64, 70-71, 81].

A Los Angeles to Mexico City telegram is, in the usual course of business, punched on tape at Los Angeles; the tape is placed in a transmitter which sends electrical impulses to Dallas, resulting in reproduction of a similar or reperforated tape. The reperforated tape is in turn placed in another transmitter electrically connected with a Western Union office at San Antonio. In the latter city the message is printed on a gummed tape and that tape is

placed upon a blank, resulting in a reproduction of the message in form not unlike that of the conventional delivered telegram [Tr. 71-72, Ex. 12]. A Western Union employee then prepares a new perforated tape which is passed through another transmitter, causing reproduction of the message in Mexico City [Tr. 71, 73]. The message described in the Indictment was in fact handled in the customary manner described above [Tr. 48-52, 79-80, Exs. 11, 12].

## B. Questions of Law.

### I.

Is a telegram originating in the United States and transmitted to a point in a foreign country transmitted "by means of interstate wire" within the meaning of Title 18, United States Code, Section 1343, if it is actually and necessarily sent by wire across interstate boundaries to a point in another state where it is received, recorded and subsequently retransmitted to the foreign addressee?

### II.

Do the courts of the United States lack jurisdiction over a defendant who alleges that he was seized and deported from a foreign nation by its agents who delivered him to officers of the United States at the point of deportation?

The foregoing questions of law were raised in the trial court in the manner stated at page 5 of the Brief of Appellants.

## ARGUMENT.

### I.

A Telegram Originating in the United States and Addressed to a Point in a Foreign Country Is Transmitted "by Means of Interstate Wire" Within the Meaning of Title 18, United States Code, Section 1343, if It Is Actually and Necessarily Sent by Wire Across Interstate Boundaries to a Point in Another State Where It Is Received, Recorded and Subsequently Retransmitted to the Foreign Addressee.

Title 18, United States Code, Section 1343, entitled "Fraud by Wire, Radio or Television," provides in pertinent part:

"Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted *by means of interstate wire* . . . any . . . signals . . . or sounds for the purpose of executing such scheme or artifice shall be fined . . . ." (Emphasis added.)

Although the telegram alleged and proven was actually and necessarily transmitted by means of a wire crossing interstate boundaries, appellants nevertheless contend that it was not sent "by means of interstate wire" because it was addressed to a point outside of the United States.

The initial vice in the argument of the appellants in support of that conclusion is that it rests upon the definitions of terms not pertinent to the crime charged in the Indictment. The words of the charging statute sig-

nificant to the questions are "by means of interstate wire." It is the use of the physical facility, the actual wire crossing state lines, for the purpose of executing the scheme or artifice, which is proscribed. Therefore, the definitions of "interstate communication" and "interstate transmission" at 47 U. S. C., Sec. 153(e) are not pertinent. However, if these words are, somehow, read into the statute, their definitions would, nevertheless, include the signal and sound alleged and proven. There was, in fact, a transmission from "(a) state . . . of the United States (California) . . . to . . . (an) other state . . . of the United States (Texas)." 47 U. S. C., Sec. 153(e)(1). The further transmission from Texas to a point in the Republic of Mexico can hardly vitiate the interstate character of the prior transmission from California to Texas.

Appellants' contention that the transmission can be "by means of interstate wire" only if the ultimate destination of the message is at a point in a state other than the state of origin is for a further reason inconsistent with the statutory definitions cited by them. In additional language not quoted in appellants' brief those definitions include (with limitations not here pertinent) transmissions originating in and intended for final delivery at points in the same state of the United States. Thus, 47 U. S. C., Sec. 153(e)(3) provides that the terms "interstate communication" or "interstate transmission" mean communication or transmission:

"(3) between points within the United States but through a foreign country; but shall not, *with respect to the provisions of subchapter II of this chapter*, include wire or radio communication between points in the same State, Territory, or possession of the



United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission." (Emphasis added.)

Subchapter II, entitled "Common Carriers," does not contain the statute under which the indictment was brought.

The statutory definitions cited suggest that Congress intended that a broad interpretation be given to the terms in question. Although we do not, for the reasons noted above, believe that those terms are germane to the questions of law raised by the appeal, we submit that their use in the statute under consideration would compel the same conclusion as must be reached by giving a literal interpretation to the words "by means of interstate wire."

The term "interstate commerce" is more susceptible to the suggested limitation that points of origin and destination must be in different states of the Union than is the expression "by means of interstate wire." However, the cases defining the concept of interstate commerce reject such an arbitrary and unwarranted qualification. Thus, certain federal penal statutes proscribe the transportation of named objects in interstate commerce when such transportation is accompanied by a certain knowledge or intent, *e.g.*, the Dyer Act, 18 U. S. C., Sec. 2312, June 25, 1948, Chapter 645, 62 Stats. 806; and the Mann Act, 18 U. S. C., Sec. 2421, June 25, 1948, Chapter 645, 62 Stats. 812, amended May 24, 1949, Chapter 139, Section 47, 63 Stats. 96. It has been generally held that the gravamen of the offense charged in each of those statutes is the transportation of the forbidden object across a state line. Whether the points of beginning and ultimate destination are or are not in the same state is immaterial. Dyer Act:

*Hughes v. United States*, 4 F. 2d 387 (8 Cir., 1925); *United States v. Winkler*, 299 Fed. 832 (D. C. Tex., 1924). Mann Act: *Batsell v. United States*, 217 F. 2d 257 (8 Cir., 1954); *Mortensen v. United States*, 39 F. 2d 967 (8 Cir., 1943), reversed on other grounds, 322 U. S. 369; *contra*, *United States v. Wilson*, 266 Fed. 712 (D. Ct. Tex., 1920), criticized in *United States v. Winkler*, *supra*, and *Mortensen v. United States*, *supra*. Those decisions are inconsistent with appellants' "destination" theory.

Similarly, in civil cases involving the concept of interstate commerce, the federal courts have rejected the contention that there must be a transportation or transmission from a point in one state to a point in another state, and have characterized as interstate commerce transportation and transmissions between points in the same state, if they cross interstate boundaries. *Cornell Steamboat Co. v. United States*, 321 U. S. 634, 64 S. Ct. 768, 88 L. Ed. 978 (1944); *Missouri Pac. R. Co. v. Stroud*, 267 U. S. 404, 45 S. Ct. 243, 69 L. Ed. 683 (1924); *Western Union Telegraph Co. v. Speight*, 254 U. S. 17, 41 S. Ct. 11, 65 L. Ed. 104 (1920). The *Speight* case involved a telegraph message sent through a state other than the state of origin to a terminus within the state of origin. If the term "interstate commerce" includes transportation and transmissions crossing state lines without regard to whether the points of origin and destination are in different states, *a fortiori*, the term "by means of interstate wire" does not require that the message be ultimately destined for a point in a state other than the state of its origin, but only that the message in fact be transmitted by a wire connecting two or more states.

A further fallacy in the argument of the appellants is that it presupposes that the terms "interstate" and "foreign" are mutually exclusive. In fact, as is well illustrated by the circumstances of this case, a transmission may partake of both interstate and foreign character. Their misapprehension in this regard is illustrated by the decision in *Border Pipe Line Co. v. Federal Power Commission*, 171 F. 2d 149 (C. C. A., D. C., 1948), cited at page 13 of Brief of Appellants. In that case petitioner owned and operated a gas pipeline located wholly within the state of Texas. It sold its gas at its terminus near the Rio Grande River to an industrial consumer which transported the gas into Mexico. Although petitioner had secured the appropriate permits for export of gas, it was contesting an order of the Federal Power Commission which would regulate petitioner as a natural gas company engaged in interstate commerce. The court said, in part:

" . . . Of course, if a company be in both interstate and foreign commerce, one might burden the other and so produce the result which the burden of intrastate on interstate commerce causes. But we do not have that situation here. The operation before us is wholly local, and it is only because of petitioner's sales for foreign commerce that the Commission seeks to control all its activities."

In the cited case there was no transportation of gas into or through a second state. The facts of the *Border Pipe Line* case would, therefore, be analogous to a communication by wire from Los Angeles, California, directly across the California-Mexico Border to Tijuana, Mexico. They are not, however, analogous to the case at bar where the allegations of the Indictment and the proof show a

transmission from Los Angeles, California, to Dallas, Texas, thence to San Antonio, Texas, all occurring prior to the further transmission to Mexico. Indeed, the language of the *Border Pipe Line Co.* case quoted above suggests that the court there would have reached the opposite result had the gas transported into Mexico been recovered in Oklahoma, shipped to a point in Texas, and thereafter transmitted to a point in the Republic of Mexico.

*Powell v. United States*, 112 F. 2d 764 (4 Cir., 1940), is also cited by the appellants, but appears to give scant support to their position. There appellants had been indicted for violation of the Elkins Act in that they had failed to observe published tariffs in connection with a shipment for export from Goldsboro, North Carolina, to Wilmington, North Carolina. The Government did not there argue that the shipment was not in foreign commerce, as is asserted by appellants at page 14 of their brief. On the contrary, the Government successfully argued that the shipment was in foreign commerce. The holding of the court was that the shipment was one in foreign commerce to which the interstate tariffs were applicable.

The quotation from *State of Texas v. Anderson, Clayton & Co.*, 92 F. 2d 104 (5 Cir., 1937), appearing at page 15 of the Brief of Appellants, is inaccurate. The correct quotation is, “. . . in determining whether a particular movement of freight is interstate or intrastate or foreign commerce, the intention existing at the time the movement starts governs. . . .” 92 F. 2d at 107. (Emphasis added.) As suggested by the words “or intrastate” omitted by appellants, the question in that case was whether certain shipments of cotton were intrastate on

the one hand, thus being subject to state regulation, or interstate and foreign on the other hand and not subject to the jurisdiction of the State Railroad Commission. That court was not concerned with distinctions between foreign and interstate commerce, and placed both in the same category for purposes of the questions to be decided by it.

Additional authorities cited by appellants at page 15 of their Brief appear to have no pertinence to the questions raised by this appeal, and in the interests of brevity will not be discussed here.

Appellants assert that the letter of March 30, 1956 from the Attorney General of the United States to the Speaker, House of Representatives (Appellants Br. pp. 10-12), recommending amendment of 18 United States Code, Section 1343, discloses "a fundamental weakness" in the Government's position. That contention was not made in the District Court; therefore the Government has had no opportunity to place upon the record of this case the additional facts of the matter alluded to by the Attorney General in order to show that the amendment was suggested by him to meet a situation essentially different from the case at bar. Under such circumstances, we believe it appropriate to represent to this Court the facts of the case which prompted the Attorney General's letter. We stand ready to support that statement by appropriate proof if so required.

The Attorney General's letter of March 30, 1956 in fact refers to allegations that a telephone call was made from a point in Mexico to Los Angeles, California, in the execution of a scheme to defraud. The call was transmitted by a wire which crossed the California-Mexico boundary and did not cross any interstate boundary.

Elsewhere in this brief appellee has urged that a communication may be solely interstate or solely foreign, or both interstate and foreign in character. The charging statute, as written at the time of the events of the case at bar, did not reach messages solely foreign in character because such messages were not sent "by means of interstate wire." An amendment appropriate to meet that omission was therefore proposed. Such an amendment cannot, however, cast any doubt upon the literal application of the statute in its original text to messages both interstate and foreign in character which are sent by "means of interstate wire."

Appellants assert that the District Court refused to define the terms "by interstate and foreign wire" which appear in the Indictment (Appellants' Br. p. 17). The exact language of the Indictment is "by *means* of interstate and foreign wire" [Tr. 6; emphasis added.] The statutory phrase "by means of interstate wire" (18 U. S. C., Sec. 1343) was defined in an instruction of the court set out elsewhere in Appellants' Brief as a specification of error [Tr. 91; Appellants' Br. p. 7]. The words "and foreign" were not defined. However, they are descriptive only, do not constitute a necessary part of the Indictment, and could have been wholly omitted without doing violence to the statement of the offense.

Furthermore, appellants did not offer an instruction containing a definition of transmission by means of foreign wire. Their proposed Instruction No. 2 [Tr. 92; Appellants' Br. p. 6] defines "foreign transmission" which is not the language of the Indictment or the statute. That Instruction was also objectionable because it misquoted the Indictment in its opening sentence, thus: "The Indictment refers to transmittal by interstate *or*

foreign wire.” (Emphasis added.) Substitution of “or” for “and” is consistent with the appellants’ theory that a transmission must be either fish or fowl, interstate or foreign. However, appellants can hardly complain of the court’s refusal to rewrite the Indictment and the statute.

Appellants’ proposed Instruction No. 4 and their objections to Government’s proposed Instruction No. 10 [Tr. 91-93; Appellants’ Br. p. 7] present the question defined at the opening of this portion of the Argument and discussed in detail above. Their proposed Instruction No. 5 [Tr. 93; Appellants’ Br. p. 7] defines the terms not appearing in the statute or the Indictment, and is also framed under appellants’ “fish or fowl” view of the nature of the telegram in question, which theory has been also treated above.

## II.

**The Courts of the United States Do Not Lack Jurisdiction Over a Defendant Who Alleges That He Was Seized and Deported From a Foreign Nation by Its Agents Who Delivered Him to Officers of the United States at the Point of Deportation.**

Appellant Jensen moved to dismiss the Indictment on the ground that the Court had no jurisdiction over his person [Tr. 15-16]. The only showing made to support the motion was by way of affidavit alleging that he was seized and deported by Mexican authorities without “proceedings” or access to counsel [Tr. 17-18]. There was no allegation that any officer or agent of the United States had any connection with the acts of Mexican officials complained of, except that agents of the United States took him into custody at Laredo, Texas, the point of

deportation. Not only is there no allegation or proof of illegal act or impropriety on the part of any officer or agent of the United States, it is not even shown that the conduct of the Mexican officials described was in violation of the laws of the Republic of Mexico.

A much stronger showing would not have afforded to the appellant Jensen a defense to this action or a challenge to the jurisdiction of the Court. As was said in *Strand v. Schmittroth*, 233 F. 2d 598, 604 (9 Cir., 1956):

“It has long been the rule in criminal prosecutions that if the accused is personally before a court having jurisdiction of the subject matter, that court has jurisdiction over the accused regardless of how the accused was brought into the presence of the court.”

The footnote to the text last quoted contains a summary of the leading cases as follows:

“*Ker v. People of State of Illinois*, 1886, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (kidnapped in Peru and brought before an Illinois court); *Mahon v. Justice*, 1888, 127 U. S. 700, 8 S. Ct. 1204, 32 L. Ed. 283 (seized by armed men in West Virginia and taken to Kentucky); *Pettibone v. Nichols*, 1906, 203 U. S. 192, 27 S. Ct. 111, 51 L. Ed. 148 (kidnapped in Colorado and taken to Idaho for trial); *Moyer v. Nichols* (*Haywood v. Nichols*), 1906, 203 U. S. 221, 27 S. Ct. 121, 51 L. Ed. 160. Many state citations are listed in *Pettibone v. Nichols*, 203 U. S. at page 215, 27 S. Ct. 111. Additional federal cases are *In re Johnson*, 1897, 167 U. S. 120, 17 S. Ct. 735, 42 L. Ed. 103 (illegal arrest); *Malone v. United States*, 9 Cir., 1933, 67 F. 2d 339 (premature arrest); *United States ex rel. Voight v. Toombs*, 5 Cir., 1933, 67 F. 2d 744 (wrongful seizure beyond territorial jurisdiction of court); *Cardigan v. Biddle*, 8 Cir., 1925, 10 F. 2d 444 (fugitive from justice surrendered on



request of another state may be tried in demanding state for crimes other than the one for which he was surrendered).”

Although a petition for rehearing *en banc* was granted in the *Schmittroth* case on October 1, 1956, the issues presented on rehearing do not affect the discussion quoted above.

*McNabb v. United States*, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1942), cited by appellant Jensen, is obviously inapplicable to the question under consideration. In *McNabb* a conviction was reversed because based in part upon a confession taken during a period of unnecessary delay between arrest and arraignment. By contrast, in the case at bar there is no wrongful act of a federal agent alleged or proven. No evidence obtained by means of a wrongful act on the part of any person was offered or received.

In *United States v. Rosenberg*, 195 F. 2d 583 (2 Cir., 1952), cert. den. 344 U. S. 838, 73 S. Ct. 20, 97 L. Ed. 652, also cited by appellants, the Court refused to pass upon a similar contention because the defendant did not make timely motion under Rule 12(b) of the Federal Rules of Criminal Procedure.

The Motion in the instant case was filed and served on appellee on Friday, May 18, 1956 [Tr. 15-18; and see Proof of Service attached to Motion to Dismiss for Lack of Personal Jurisdiction over Defendants Michael Victor Schlising and William Bering Jensen in the Transcript of Record prepared by the Clerk of the United States District Court and heretofore docketed with this Court]. The Motion was heard on the next business day, Monday, May 21, 1956, which was also the first day of trial [Tr. 19-20]. There was no order shortening time for hearing

of the Motion. At the time of the arraignment and plea of the appellant Jensen, May 1, 1956, the Court ordered that motions to be made by all defendants be filed not later than May 9, 1956 [Tr. 7]. Failure of the appellant Jensen to comply with that order of the Court was also a failure to comply with the provisions of Rule 12(b), Federal Rules of Criminal Procedure, as follows:

“(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

“(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.”

Also lacking was the five-day notice of motion required by Rule 45(d). The delay in the filing and service of the Motion until the last business day preceding the day of trial made it manifestly impossible for the Government to meet the factual allegations of misconduct on the part of Mexican officials. Therefore the Government expressly refused to waive the defect in notice [Tr. 60]. The contention that the Court lacked personal jurisdiction over the person of the defendant Jensen was renewed by his

Motion in Arrest of Judgment [Tr. 29-30]. However, in *United States v. Rosenberg, supra*, the Court held that a defendant may waive an objection that he might otherwise have to jurisdiction over his person, that failure to make timely motion under Rule 12(b) would constitute such a waiver, and that the point could not be raised by motion in arrest of judgment.

For the foregoing reasons the Government submits that the appellant Jensen's Motion to Dismiss for Lack of Personal Jurisdiction was neither timely nor meritorious.

### Conclusion.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 15248.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

EMIL WENTZ and WILLIAM BERING JENSEN,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

PETITION FOR REHEARING.

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FILED

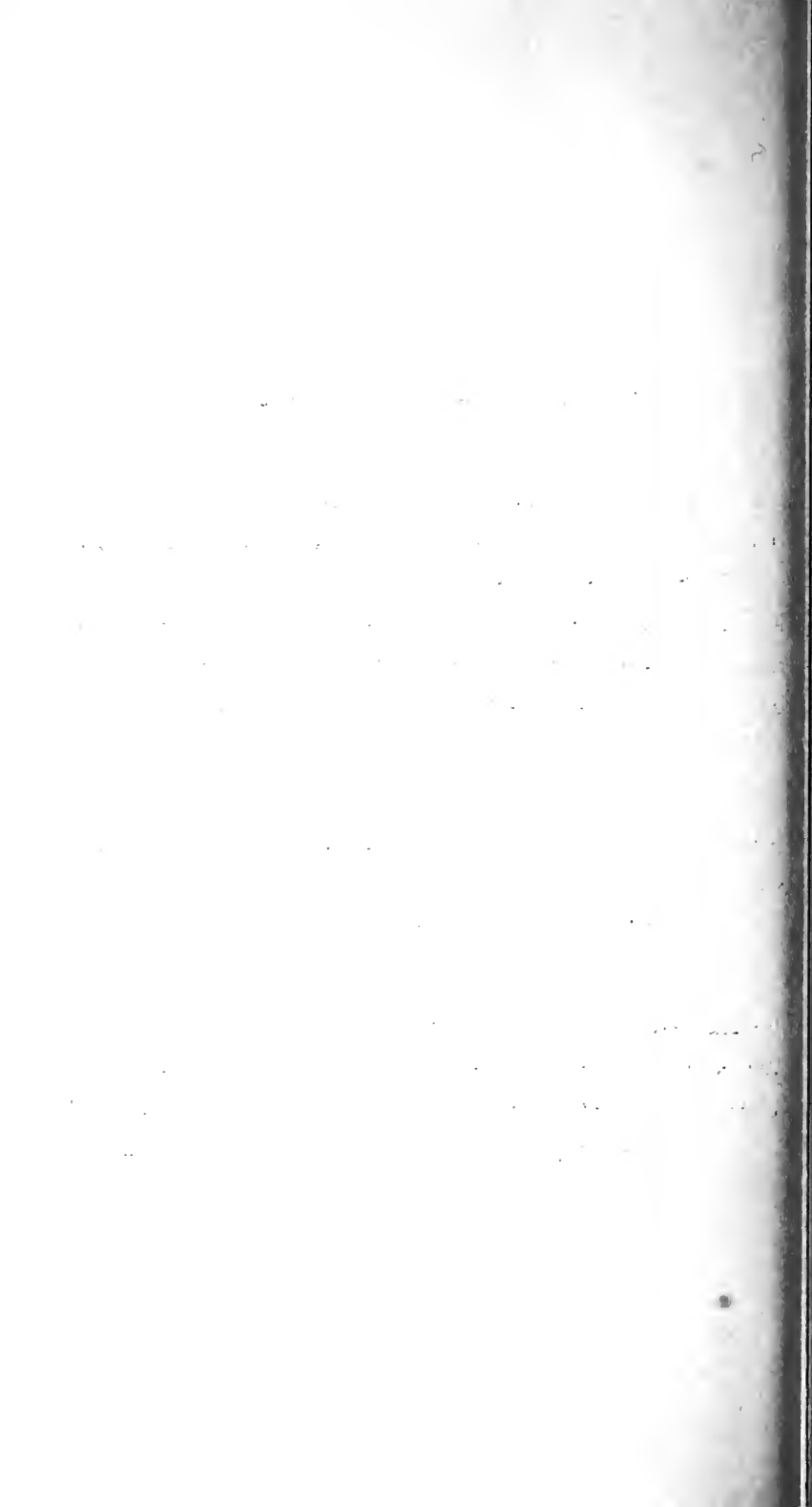
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PAUL P. O'BRIEN, CLERK



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No. 15248.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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EMIL WENTZ and WILLIAM BERING JENSEN,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## PETITION FOR REHEARING.

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*To the Honorable Albert Lee Stephens, Honorable James Alger Fee, and Honorable Richard H. Chambers.*

Rule 28, Rules of United States Court of Appeals, for the Ninth Circuit.

Title 18, United States Code Section 1343 is found in the Communications Act Amendments of 1952. Therefore, the provisions of the Communications Act, Amendments of 1952, and all pertinent provisions in the Amendments are applicable. The 1952 Amendments are found in Title 47, United States Code, Chapter 5. Section 152 of Title 47, United States Code, recites:

“(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire . . .”

Section 153 thereof defines "communication by wire":

"(a) Wire communication or communication by wire means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services incidental to such transmission."

"(f) Foreign communication or foreign transmission means communication or transmission from or to any place in the United States to or from a foreign country, . . ."

"(e) Interstate communication or interstate transmission means communication or transmission from any state, territory, or possession of the United States . . . to any other state, territory, or possession of the United States . . ."

18 United States Code Section 1343, Fraud by Wire, being a part of the 1952 Communications Act Amendments, must necessarily be construed in the light of other pertinent portions of the 1952 Communications Act Amendments. The indictment herein alleges a scheme to defraud. It is the last paragraph thereof which must be construed as written, in the light of Communications Act Amendments of 1952. It alleges, as follows:

"On or about November 22, 1955, defendants . . . for the purpose of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the city and county of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico . . ."

The function of the court is to construe the indictment as written. See: *Caywood v. U. S.*, 232 F. 2d 220, at page 231.

Under the Communications Act, Amendments of 1952, and specifically the definition therein of "foreign communication" or "foreign transmission," the gravamen of the offense alleged would be a communication or transmission from Los Angeles, California, to Mexico City, Mexico. The very definition fits squarely with the case at bar, namely, from any place in the United States, to wit, Los Angeles, California, to a foreign country, to wit, the Republic of Mexico.

Government counsel argues, in paragraph two, page 14 of his brief, that the words "and foreign" are descriptive only, do not constitute a necessary part of the indictment, and could have been wholly omitted without doing violence to the statement of the offense. In the light of the definition given by Congress in the Communications Act, Amendments of 1952, it would appear proper to assert that the definition itself, when applied to the indictment, eliminates the notion of interstate communication or interstate transmission and, therefore, the term "interstate" could and should have been wholly omitted therefrom.

Whether or not the chain of transmission was broken was a question of fact and should have been submitted to the jury under proper instructions.

Appellant requested instructions which would have permitted the jury to determine this question. The court refused to give the requested instructions to the jury. Appellant made timely objection to the refusal to charge as requested, giving the grounds for the objections before

the jury retired. Rule 30 of the Rules of Criminal Procedure was complied with.

By enacting the Communications Act of 1934 and the 1952 Amendments thereto, Congress had prescribed the standards upon which the guilt or innocence of the appellants were to be determined. It was the duty of the court to provide the jury with instructions which would set out the standards to be applied in the present case. This the court refused to do. Defendants' proposed instruction number 2 was refused by the lower court. This refusal is the basis of subsection (g), Specifications of Error, on page 6 of Appellants' brief. The court below gave Government's proposed instruction number 10, as follows:

"A telegram is sent by means of interstate wire as those words are used in the statute and in the indictment. If sent by a wire which crosses the state lines, whatever may be its destination . . ."

This instruction given does not comply with the standards set out in the Communications Act, Amendments of 1952.

In *Screws v. U. S.* (1945), 325 U. S. 91, 89 L. Ed. 1495, a conviction was reversed for failure to define the crime charged by reciting the essential ingredients thereof, even though counsel did not except to the trial court's charge to the jury. The court stated:

"Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which congress has prescribed."

In *Morris v. U. S.* (9 Cir.), 156 F. 2d 525, 169 A. L. R. 305, which was an appeal from a conviction after trial by jury, the court stated:

“It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant . . . the court did not define the offense of which the appellant was charged and was being tried and the jury was given no opportunity of applying the facts to the law . . . .”

Appellants' position that the communication was a foreign one is best illustrated by reference to the Supreme Court Opinion in the case of *Texas & New Orleans Railroad Co. v. Sabine Tram Company*, 227 U. S. 111, at page 126, wherein the court states:

“The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demands of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the devise of separate bills of lading the commerce will be given local character, though it be essentially foreign.”

“Courts of the United States are of limited jurisdiction, possessing only such powers as are either expressly or by necessary implication conferred upon them. There is no presumption in favor of their jurisdiction.”

*Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371, 84 L. Ed. 329.

Since the telegram, which is the only means by which the court below acquired jurisdiction to hear and determine the questions presented by the indictment, on its face recites that it originated at Los Angeles and was transmitted to Mexico City, the definition in Title 47, United States Code Section 153, subsection (f) applies. The plain language thereof requires the conclusion that the wire did not bring the charge within the purview of 18 United States Code Section 1343.

Respectfully submitted,

ANGUS D. McEACHEN,

*Attorney for Appellants.*

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### Certificate of Counsel.

ANGUS D. McEACHEN, being first duly sworn, deposes and says, that:

I do hereby certify that in my judgment the herein Petition for Rehearing is well founded and that it is not interposed for delay.

ANGUS D. McEACHEN.

No. 15249

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**United States  
Court of Appeals**  
for the Ninth Circuit

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C. S. JOHNSON COMPANY, a Corporation,  
Appellant.

vs.

MERLE W. STROMBERG, Doing Business as  
California Batching Equipment Co.,  
Appellee.

---

**Transcript of Record**  
In Two Volumes

**Volume II**  
(Pages 311 to 654)

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Appeal from the United States District Court for the  
Southern District of California,  
Central Division.





No. 15249

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**United States**  
**Court of Appeals**  
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C. S. JOHNSON COMPANY, a Corporation,  
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**Transcript of Record**  
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**Volume II**  
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**Appeal from the United States District Court for the**  
**Southern District of California,**  
**Central Division.**



(Testimony of Carl W. Tilden.)

The Court: Do you know what causes the balling up in the mixer?

Mr. Sellers: No one asked him that, your Honor.

The Court: You don't do you?

The Witness: No, sir. I don't know what causes it.

Mr. Sellers: But, your Honor, is that essential? If you would obtain raw material from two different sources and [247] then pass it through the same——

The Court: Now, just a minute.

Mr. Sellers: Yes.

The Court: How many times have you been by the truck when you observed the balling up of this material?

The Witness: I have been by a truck, I believe, twice.

The Court: When was that?

The Witness: Last summer.

The Court: Where was it?

The Witness: Excuse me. The previous summer.

The Court: The summer before last?

The Witness: 1954, right.

The Court: Where was it?

The Witness: That was right here in Los Angeles County out on a flood control project.

The Court: What kind of batching plant was it?

The Witness: The batching plant was a cement with side entry on his plant. I don't know who made the plant.

The Court: All right. Now, where was the other experience?

(Testimony of Carl W. Tilden.)

The Witness: The other experience was at the same time of the year out in the San Fernando Valley on a similar project.

The Court: What kind of a plant was it?

The Witness: It was a home-made batch plant with cement [248] screw side entry.

The Court: Are those the only two experiences you can remember?

The Witness: That I was standing beside the truck, yes.

The Court: That is, that you observed personally?

The Witness: Those are the only two, but I hear——

The Court: Then how can he compare——

Mr. Sellers: Your Honor, must the man be standing beside a truck in order to have knowledge of this sort of thing? I respectfully contend the man can be an expert in the field without having stood beside the truck at the time it occurred. You may be right. Maybe he doesn't have that information, but I think we are entitled to find out, and I know your Honor will permit me to ask what other basis he has.

The Court: Go ahead, if you can qualify him. I am willing for you to qualify him.

Mr. Sellers: Thank you, your Honor.

Q. Do you have any other basis, Mr. Tilden, for the formation of an opinion relative to the action of balling up in trucks and the relevancy of the type of mix received in that connection?

(Testimony of Carl W. Tilden.)

A. Yes, I believe I have.

Q. Well, will you please explain that to the court so that we can judge whether or not you are qualified to voice an opinion on the matter? [249]

A. I have 54 distributors throughout the country. These 54 distributors have an awfully nasty habit of contacting me direct when things go wrong. Cement balling is what they consider something as gone wrong. It is not normal.

Also, I have three field service men who work directly for me, whom I dispatch to these various jobs to see if we can't help in some way to correct their problem.

Q. What information have you gained through those sources which gave you information on this point?

Mr. Lyon: Your Honor, I will object to this as based upon hearsay. He is just repeating now what somebody else has told him.

The Court: Can you qualify an expert witness on hearsay?

Mr. Sellers: I am not qualifying him as an expert, your Honor. This gentleman is the sales manager——

The Court: Yes, you are. You are trying to get him to testify that balling up occurs less frequently from a Johnson type installation than the other.

Mr. Sellers: I am not asking for his opinion, your Honor. If he were an expert, I would ask for his opinion on a particular point. I am asking him what his experience has been.

(Testimony of Carl W. Tilden.)

The Court: He has had two experiences.

Mr. Sellers: Oh, no, no, your Honor. I can't agree to that.

The Court: Can you qualify a man on hearsay, anything [250] that he has got from his——

Mr. Sellers: These are figures and facts that are his business experience in his every-day business, your Honor. Do you mean to say the president of a company who is running the entire company, and he knows what that company does, he is not down on the job digging the coal, does not know the over-all picture of the company?

Now, this man, these reports come in to him day by day. He knows what the problems are and he corrects the difficulties. He handles the problems. It seems to me we are entitled to his information, at least, if not his personal information, at least what the experience of his company is.

Now, let's not put it in terms of an expert, but what is the experience of his company in this field. Certainly he can tell that. If he can't, who can? The man down on the job can't tell. Here is the man who is the sales manager of his company. He receives these reports from the field that they have balling up problems, and he investigates the troubles and it develops that the Johnson type plant gives less trouble.

The Court: If he has the reports, aren't the reports the best evidence?

Mr. Sellers: There has been no objection on that point, your Honor.

(Testimony of Carl W. Tilden.)

Mr. Lyon: There will be.

Mr. Sellers: Well, there hasn't been, your Honor. There [251] has been no objection on best evidence, no objection at all. I think that I am entitled to show that this man in his daily experiences, telephone calls, possibly, so he knows what happens in his company. To say we must reduce it to personal terms——

The Court: But there hasn't been any testimony yet that these complaints are based on the question of whether or not it is a type of plant where the concrete is put into the mixing hopper in the center or comes from the side.

Mr. Sellers: I haven't been able to do that yet.

The Court: All he says so far is that he has had these reports.

Mr. Sellers: Yes, he has.

The Court: Let's find out. Let's see if we can't lay some foundation to get the testimony admitted.

Mr. Sellers: I would like to, your Honor, but this gentleman is the sales manager of the company. His experience is based on the experience as sales manager. In comes a report from the field that they have balling up.

The Court: Let him tell about these reports.

Mr. Sellers: I am trying to do that.

The Court: Where did they come from and what kind of equipment was involved?

Mr. Sellers: I did ask that, your Honor. You remember I asked if his experience was based on anything besides the two standing beside the truck

(Testimony of Carl W. Tilden.)

episodes, and he said yes, that [252] he had these 53 or 54 distributors and three specialists, and all those come in to him. Now, I will follow your Honor's suggestion.

Q. Would you please detail some of these experiences which you have had?

The Court: No. Wait a minute. Not the experiences he has had, because he has testified to what he has had.

Mr. Sellers: I beg your pardon.

The Court: The experience has been called to your attention now.

The Witness: The experiences that have been called to my attention are by and large based on when we first entered this business, and we have been in the field about seven or eight years building these truck mixers. On our first entry into the business, our distributors were quite unfamiliar with the problem of selling and servicing and making these things operate. The people that bought our product were unfamiliar with it, and during that period we had a great many calls to say, "Come on out here and show me how to make this thing operate."

The Court: Just a minute.

The Witness: That happened quite a while ago, Judge.

The Court: Just a minute. When you say "make this thing operate," what are you talking about? Is it your truck or the batching plant? [253]



(Testimony of Carl W. Tilden.)

The Witness: He is calling us because he wants us to make our truck operate.

The Court: The truck operate, all right.

The Witness: Yes, the truck, not the plant, because we don't have anything to do with it. My experience gained and my knowledge, my down-to-earth knowledge on this was gained through this, I would call it difficult period for us, during our entry into this business.

As we learned, so did the people that operated our machines and so did the people that sold them and so did the people that serviced them.

In the last two years or so, a lot of problems might arise in the field where our distributors would automatically take care of them so that we as the manufacturer would not learn of them and, therefore, our experience in the last year to a year and a half has not been as broad and as varied as it was prior to that time, and for me to be quite specific, your Honor, on a date and a time and when a certain thing happened, and under what conditions it happened, I couldn't produce any evidence right with me today. I didn't bring it.

The Court: Let me ask you this. You say that this was when you first started out about six or seven years ago, is that correct?

The Witness: Actually, we produced our first mixer eight years ago. [254]

The Court: All right. I presume this is a local organization?

The Witness: Yes, sir.

(Testimony of Carl W. Tilden.)

The Court: And I presume you started selling locally?

The Witness: Yes, sir.

The Court: These calls came in, I presume, locally?

The Witness: Yes, sir.

The Court: That is, in the first year or so, you didn't have nationwide distribution?

The Witness: That's right.

The Court: You had local distribution?

The Witness: Yes.

The Court: All right. Now, during this period, how many Johnson batch plants were there in Los Angeles County or in Southern California?

The Witness: I have no idea.

The Court: Do you know whether or not you were called out on a complaint, and you diagnosed the problem because the cement was not being placed in the center rather than from the side?

The Witness: I believe my point is that all my experience is that we can sometimes mix it faster out of one plant than we can out of another. That is our experience as far as truck mixer operation.

The Court: Why do you say you can mix it faster? Is it [255] because of the quality of the materials, the question of the amount of water in the materials, or is it a question of the way it is mixed?

The Witness: It is my theory, because of the fact that there is a very definite difference between mixing from—batching out of one type plant and

(Testimony of Carl W. Tilden.)

another, that it must be in the batching of the batch plant that helps the truck mixer to do its job.

The Court: That is just a theory, isn't it?

The Witness: No. It is proven. I mean one plant to us will allow the truck mixer to mix faster than another type, because possibly the materials are intermingled before they enter the drum.

The Court: Suppose I took one of your mixing trucks and manually put in the materials. I put in the rock and the sand, and on top of that I put in cement and put in the proper amount of water.

The Witness: Yes.

The Court: Wouldn't your revolving drum truck adequately mix that?

The Witness: It would mix it, but it would mix it much faster if you put in a shovelful of sand, a shovelful of aggregate, and a shovelful of cement, and a little water in between, because you are sandwiching all that material in there, and it would mix it much faster that way than [256] individually.

The Court: Forgetting the period of time, it would mix it adequately, wouldn't it?

The Witness: It would mix it if you took long enough, yes, sir.

The Court: So the only question here is time?

The Witness: Yes.

Mr. Sellers: That is one point, your Honor.

Mr. Lyon: May I move to strike the last two answers of this gentleman? There is no proof in this record whatsoever that he has ever run a mix-

(Testimony of Carl W. Tilden.)

ing plant, a batching plant, or ever been present at a time when this was put in one of these machines.

The Court: Well, I think it is up to the court to weigh the evidence. A witness' expert testimony is no more valuable than the foundation that he lays.

Mr. Sellers: Well, if I may say so, your Honor, I am not attempting to qualify this gentleman as an expert in the field of batching equipment, but instead he has practical and fact experience in the field of trucks and in the selling of trucks and the problems that a manufacturer of trucks runs into, and I don't want to qualify him as an expert. I am asking him questions concerning what experience he has had in the matter of time taken, in treating a mix from one type of plant and another, and in the question of balling up. I think [257] that he can give his experiences and what conclusions he draws from those experiences, not as an expert but——

The Court: I have overruled the objection and you have got your statement in the record. Now, suppose you proceed.

Mr. Sellers: Thank you, your Honor. Now I have lost my place.

The Court: Well, maybe we ought to take the afternoon recess. It's nearly 3:00 o'clock.

Mr. Sellers: Thank you, your Honor. I would like that.

The Court: Recess until five minutes after 3:00.

(Recess.)

(Testimony of Carl W. Tilden.)

The Court: You may proceed.

Q. (By Mr. Sellers): Did I understand you properly to say, Mr. Tilden, that your experience upon which you base your statements of what has happened, those experiences were acquired largely prior to the last several years?

A. Yes, sir.

Q. And by virtue of the growth of your business and the greater efficiency of your field people, most of these problems no longer come into your central main office, but instead are handled out in the field?

A. Yes, sir.

Q. Does that explain in part why you are not able at this time to pinpoint these particular difficulties in terms of the plant where this problem arose and that problem arose? [258]

A. Yes, sir.

Q. But from your general experience dating back to the time when these problems did come into your plant, was it your experience that you received fewer complaints as to balling up in your trucks where the mix had been received from plants of the Johnson type, if you know?

Mr. Lyon: I will object to that question, your Honor. This gentleman is supposedly a fact witness. I would like the testimony to be confined to his own personal experience. He is asked in this question to testify to things that were told him and not things that he learned from his own personal experience.

The Court: Overruled.

(Testimony of Carl W. Tilden.)

Mr. Sellers: Thank you.

The Witness: Yes.

Mr. Sellers: Will you please read the question?

The Court: You have got a "yes" answer.

Mr. Sellers: Then let it go.

Q. Can you at this time remember even a few of those instances which support that statement?

A. Well, one particular case that I recall was on a job where the specifications were quite rigid. The batch plant was located on the job site, and the haul was quite short. They were quite interested in meeting a minimum mixing period required in the specifications, but were having [259] difficulty achieving the proper mix within the minimum specifications. In other words, they were held at that particular time to a minimum of 40 revolutions on the drum, at which time they could discharge the load according to the specifications, but when they discharged the load, they found it was not a proper mix and they would have to continue mixing to get the mix. At this particular job, we went down and instructed the drivers on——

The Court: Where was the job?

The Witness: The job was in Kansas on an air base. It was quite a large contract. We went down and instructed the drivers properly on how to operate their mixers at the proper speed to get the best mixing action from our mixer.

Also we went through our regular routine on a matter of this type of watching the batching procedures and making recommendations on when the

(Testimony of Carl W. Tilden.)

water and cement and so forth, should be induced, and were able to improve their operation, but not to the satisfaction of the inspectors within the minimum requirement.

This condition existed, I believe, for almost six months or so, and later our district manager in the territory——

The Court: Just a minute. Did you go down on the job?

The Witness: No, sir.

The Court: All you know is what somebody told you? [260]

The Witness: That's right. These are from field reports and correspondence from our people at the scene.

Mr. Lyon: I move that the answer be stricken as based on hearsay.

The Court: You know, it is purely hearsay. I don't know how you can avoid the hearsay rule as to what somebody told him. Here is a job over in Kansas. Somebody told him so-and-so.

Mr. Sellers: Your Honor, I recognize the problem we have here and the hearsay rule is certainly a stumbling block we have to overcome. On the other hand, I ask your Honor where would you go to get the over-all picture but in the head office?

The Court: If he had records, if you had reports, you might be able to get the reports in.

Mr. Sellers: But just a minute, you wouldn't be able to identify those. Reports would not be——

(Testimony of Carl W. Tilden.)

The Court: You can get them in under the rules of the court. If you have got your records kept in the ordinary course of business, although they are hearsay, they can be gotten in.

Mr. Sellers: This information that the witness has received was received in the regular course of business. Do I understand only information which is written, received in the regular course of business, is admissible? This is information which he received in the regular course of business. [261]

The Court: The rule doesn't provide for the admission of evidence other than written evidence received in the regular course of business. Any memorandum or record——

Mr. Sellers: I will accept your Honor's statement, but with all due respect, it would seem to me that the experiences which he has encountered in the regular performance of his duties——

The Court: Well, I might call your attention to Section 1732 of the Code.

“Any writing or record, whether in the form of entries in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible if made in the regular course of any business, and it was the regular course of such business to make such memorandum or record at the time of such act or transaction.”

It doesn't say any oral statements made. It is any record made.



(Testimony of Carl W. Tilden.)

Mr. Sellers: I should have had the Code and read it more thoroughly. That section doesn't help me. But I would look for another section. Very frankly, it seems not right that we should not be able to establish the experience of this man in his business. I don't ask that any particular instance to which he refers be verified, but I ask merely for the sum total of his various experiences. [262]

The Court: As far as I know, this might be a Johnson plant down there. I don't know what kind of a plant it was. He has never testified. I don't know whether he knows what type of plant it was.

Mr. Sellers: Well, let's ask him if he knows and how he knows and then we will have something to base it on.

The Court: Do you know what kind of a batching plant it was?

The Witness: It was a two-stop plant. They received the cement and the aggregate at different stations.

The Court: We have a one-stop plant here under consideration, and not a two-stop plant.

Q. (By Mr. Sellers): Let me ask you, Mr. Tilden, do you in your business keep any records which would relate and record the complaints of the type concerning which we have been inquiring about here which we might produce to satisfy his Honor?

A. We have records of correspondence where people have written in describing their trouble, yes, sir.

(Testimony of Carl W. Tilden.)

Q. Could they be made available? Would we have time to inspect those and the opportunity to inspect those or obtain those?

A. They could be made available, yes, sir.

Mr. Sellers: Your Honor, this witness only came to my office this morning for the first time and I would request that—— [263]

The Court: This case will go for a couple of more days. You can go down and make an inspection and see if you can find anything of importance.

Mr. Sellers: Then, your Honor, with that I would like to request that I be permitted to continue this witness' testimony until we have had the opportunity to do that.

The Court: Well, just leave that phase of the testimony open. I will allow you to recall the witness here if you can find any record or memorandum of these matters, but let's complete the other part of his testimony and also the cross-examination.

Mr. Sellers: All right, your Honor.

The Witness: I didn't finish my answer the last time.

Mr. Sellers: May he finish his answer, your Honor?

The Court: Yes, go ahead.

The Witness: You see, I mentioned that our field manager had visited the job location six months after we were down there to help correct their problems, and at that time they had installed a central flow plant and were meeting the specifications.

(Testimony of Carl W. Tilden.)

Mr. Lyon: May I move that that be stricken, your Honor, as based on hearsay?

The Witness: I wanted to finish.

The Court: The latter part may go out.

Mr. Sellers: The only valuable part may [264] go out.

Q. Do you have, Mr. Tilden, any record of those facts which we might find?

A. I think we can find it in our correspondence.

Mr. Sellers: Thank you, your Honor, for your help.

Q. Can you refer to any particular experiences in which you found it necessary to incorporate more expensive construction into your mix trucks by virtue of the fact that the mix plant was not giving you an adequate mix?

Mr. Lyon: Your Honor, may I object to the form of the question as not directed to his personal knowledge?

Mr. Sellers: I will limit it to his personal knowledge. I asked him if he could remember, I think, but we will limit it to his personal knowledge.

The Witness: Yes. In the case of cement balls we discussed a little earlier, in the case of cement balls where they persisted in the mix after we had covered most all of the other operational directions that we would normally suggest, where it was severe, we have installed in the mixers additional mixing fins of various designs to eliminate the balls in the mixer.

(Testimony of Carl W. Tilden.)

Q. Can you identify that particular plant to which you have referred?

A. On the addition of the fins, and so forth?

Q. Yes.

A. This particular plant was, I believe, a home-made [265] plant. In other words, there was no way of identifying it because several of these plants don't have their identification tags, and so forth, on them, but by type it was a side entry plant.

Q. Can you give us another illustration of a case in which you found it necessary to provide more complicated or expensive additions to the mix truck in order to handle the product of the batching plant?

A. A similar nature, in Las Vegas, was another one where we had a similar requirement that we made additions to the machine in order to break the balls up.

Q. Does the name Teichert and Son refresh your recollection?

A. Teichert and Son is the one I was talking about first.

Mr. Lyon: How do you spell it?

The Witness: It is Teichert and Son—I don't just exactly know.

Mr. Denny: It is T-e-i-c-h-e-r-t.

Q. (By Mr. Sellers): Would there be another example that you can recall?

A. An example would be Las Vegas Building Materials in Las Vegas, Nevada.

(Testimony of Carl W. Tilden.)

Q. Was there a San Gabriel Ready-Mix, a plant by that name? [266]

A. San Gabriel Ready-Mix, also, out here in the San Fernando Valley, we had to make the same additions to their machine.

Q. Can you state of your own knowledge whether any of those plants that did not give adequate mix and which required additional structure in your trucks, were any of those of the central feed Johnson type?

A. Not to my knowledge.

The Court: Did you see any of those plants?

The Witness: Yes, I saw the two here locally. I did not see the one in Las Vegas.

Mr. Sellers: I would like to ask this question, your Honor. Of course, it may be objected to.

Q. Can you state from your experience based upon the written records which we hope to be able to introduce tomorrow whether or not there have been any fewer complaints as to balling up from the batch plant owners of the Johnson type than from batch plant owners of other types of plants, based on your written records you have received?

The Court: You better save that question.

Mr. Sellers: I thought so, your Honor, but that is why I would rather not relinquish my direct.

The Court: Well, you can recall this witness on direct if you can find any records.

Mr. Sellers: All right, your Honor. On that understanding, then, I would like to submit him to cross-examination at [267] this time.

The Court: All right.

(Testimony of Carl W. Tilden.)

Cross-Examination

By Mr. Lyon:

Q. Mr. Tilden, are you familiar with the Nellis Air Base job in Las Vegas?

A. I am familiar with it, yes.

Q. Did trucks from your company participate in that job? A. Yes, sir.

Q. Were there any complaints as to the job that they were doing at that time? In other words, was the cement being properly mixed, the concrete being properly mixed, or not? Did you ever have any complaints from that job?

A. By memory again, the only complaint I can recall on that particular job was the rate of discharge.

Q. Did your organization find it necessary to replace the blades in your mixer trucks in order to comply with the specifications on that job?

A. No, we did not replace the blades.

Q. Are your trucks using the same blades that they used six years ago? A. No.

Q. You change your blades all the time, is that correct? [268] A. Not all of the time.

Q. Well, frequently.

A. Not frequently, no.

Q. How often do you change the blades of these mixers?

A. We have made four basic model changes.

Q. Why were those changes made?

A. To improve the ability of the machine to do its job.

(Testimony of Carl W. Tilden.)

Q. To avoid balling up?

A. Not specifically, no.

Q. Have you ever had a complaint that your mixer resulted in a balled-up job of batching, in mixing concrete?

A. Yes, definitely.

Q. Was that complaint ever found to be based on the fact that the blades in your truck weren't doing the job properly, or some other part of your mixer was not doing the job properly?

A. No, sir, not when we pointed out it was happening to all other makes at the same time.

Q. In a mixer of your type, what is the life expectancy of the blades?

A. It depends entirely on the use of the unit.

Q. Say it is under constant use on a large project.

A. What slump aggregate and the abrasiveness of the aggregate is the factor? In other words, there are so many variable factors it is not possible for anyone to say it is [269] going to be a certain length of time.

Q. It is necessary, however, to replace these blades from time to time in your trucking equipment?

A. Yes. It is a normal type of operation as far as maintenance.

Q. If the blades become too worn, what is the result?

A. Obviously, if the blades become worn to a point, a certain point, it is going to affect the mixer's ability to do its work.

(Testimony of Carl W. Tilden.)

Q. And what will be the result of its not being able to do its work?

A. To mix and discharge concrete.

Q. Will you obtain balling up in such a mixer?

A. You could.

Q. Are you familiar with the Noble type of plant?

A. Yes.

Q. Is that a concentric discharge type of plant?

A. Concentric? Do you mean is it central flow?

Q. Central flow type, if you prefer that expression.

A. I would classify it as not, but close.

Q. Wherein does it differ from a central flow type of device? Perhaps I can help you.

A. If you could refresh my memory, it would be a big help.

Q. Have you seen this particular type of Noble construction? [270]

A. In the field?

Q. Anywhere.

A. I have seen it in this book, but I haven't seen this specifically myself, no.

Q. You never have?

A. No.

Q. Have you seen very many types of batchers, Mr. Tilden?

A. I would say a majority of all types of batchers I have seen.

Q. But you haven't seen that Noble batcher?

A. Not that specific one.

Q. What type Noble batchers have you seen?

A. The side entry Nobles by and large have been my experience with Noble.

Q. I believe you testified on your direct exami-



(Testimony of Carl W. Tilden.)

nation that you had some kind of trouble in Las Vegas yesterday, or was it Kansas City?

A. It was Kansas City yesterday. I don't know what it is today.

Q. You don't know what it is?

A. It is mixing time.

Q. It is mixing time. In other words, it is the fault of your particular operator on your truck not doing it right, [271] or the equipment is not in good shape, or something of that nature? Is that the usual type of complaint you get?

A. Not the usual type of complaint, no.

Q. Let me ask you this. Is it just as possible when you get one of these complaints that the operator isn't running his truck correctly as it is some other source? A. Very possible.

Q. Another possibility is that the truck itself has some defect in it, it is either too worn or something? A. Not the truck. The mixer.

Q. The mixer. Pardon me. Is your organization the largest maker of truck mixers in the country, or do you have major competition?

A. We sure do have some major competitors, yes, sir.

Q. How would you rank yourself, say, with the top two or three? A. No. 1.

Q. You think you are the top? A. Yes.

Q. Are you much larger than the next competitor or very close? A. It is a close race.

Q. How many of these competitors of substantially your size are there in the field?

(Testimony of Carl W. Tilden.)

A. Let's say there are three competitors besides ourselves. [272]

Q. And you sell closely the same number of truck mixers that your competitors do?

A. Yes.

Mr. Lyon: That's all.

Mr. Sellers: I would like to call the witness tomorrow, if we may.

The Court: All right. You may call him back in the morning.

Mr. Sellers: Thank you, your Honor.

The Court: If he can find any records, he can bring his records here and we will discuss them. You may step down.

(Witness withdrawn.)

Mr. Sellers: I would like at this time to call Mr. Pine as a witness.

### ROGER PINE

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Roger Pine.

The Clerk: How do you spell your last name?

The Witness: P-i-n-e. [273]

### Direct Examination

By Mr. Sellers:

(Testimony of Roger Pine.)

Q. Will you please state your occupation, Mr. Pine?

A. I am a draftsman, patent draftsman.

Q. Where is your place of business?

A. Los Angeles.

Q. In your work do you make patent drawings?

A. Yes, we do.

Q. Do you also make drawings for use as exhibits in court cases?

A. That is correct.

Mr. Lyon: If the Court please, I will stipulate Mr. Pine does this type of work. He has done it for me.

The Court: Is this just a foundation for these drawings?

Mr. Sellers: That's all, your Honor.

The Court: Won't you stipulate that?

Mr. Lyon: I will stipulate that the drawings were made by Mr. Pine. There is a question in my mind whether they fully disclose the plant, your Honor. I don't claim there is anything incorrect in them. I just don't think they are complete.

The Court: All right.

Q. (By Mr. Sellers): Did you last summer, I believe it was, Mr. Pine, go to the Stanton plant at Stanton, California, and make measurements and photographs of the Stanton batching [274] plant?

A. Yes, that is correct.

Q. Did you do that for the purpose of making certain drawings in this case involved here?

A. Yes.

(Testimony of Roger Pine.)

The Court: May I ask Mr. Lyon a question? Do you raise any question about the drawings of the Stanton plant, that they are not correct drawings?

Mr. Lyon: There is only one question, your Honor. The drawings do not show the nature of the discharge of the aggregate hopper. Now, I can clarify that with Mr. Pine in a matter of one question.

Mr. Sellers: Well, if you have only one question——

Mr. Lyon: That is the only objection I have and I will clarify that.

The Court: The only purpose is to get these in.

Mr. Sellers: That's all.

The Court: Suppose you let Mr. Lyon ask the question and get them in evidence.

Mr. Sellers: They are in evidence, your Honor, but I want them clearly substantiated. Just ask your question, Mr. Lyon.

The Court: That is Exhibit 18, isn't it? [275]

### Cross-Examination

By Mr. Lyon:

Q. Referring to Exhibit 18, what is the shape of the discharge from the aggregate hopper, square, circular, or oval?      A. It is rectangular.

Q. Rectangular?

A. It is rectangular except for the additions, the continuation of the baffles, which come down to cover. It is basically rectangular.

(Testimony of Roger Pine.)

Q. This outlet at this point?

A. That opening there is rectangular.

The Court: May I ask a question relative to Section 33. You can look at that there. I assume that the aggregates are in these two right angles. Is that just vacant air there? Does that contain anything?

The Witness: That is vacant space. It contains the weighing hopper for the cement. If you will notice the section indication 33 on this view here, it is taken below the cement hoppers, so that has been eliminated in this view, so that all that we show down here is the discharge nozzle for the cement.

The Court: Then the aggregate is not all the way around the cement hopper?

Mr. Sellers: Would this help any, your Honor, to refer to Exhibit 14? He also made this [276] drawing.

The Witness: Yes, that is correct. We have these two baffle plates which divide the main weighing hopper, the aggregate weighing hopper, into three separate spaces. The central space contains the cement weighing hopper, which is shown here and here.

Now, the baffle plates or dividers are spaced from the bottom, or the opening of the main weighing hopper, the aggregate weighing hopper, so that the aggregate comprising sand and gravel will seep down underneath and cover this area here as shown in this sectional view 33 here.

Mr. Sellers: Of Exhibit 14.

(Testimony of Roger Pine.)

The Court: Then you would see that the aggregate is all the way around the circle that indicates the cement?

The Witness: Well, it is actually below it, as more clearly shown here (indicating).

Q. (By Mr. Lyon): At this point here it does not surround it, is that correct? A. No.

Q. At this point, at the point of discharge of the cement hopper, it is not surrounding it, is that correct?

A. No, not as I understand your question.

Mr. Lyon: There is only one further question, your Honor, if you are through.

The Court: I am through. All right.

Q. (By Mr. Lyon): Did you notice the shape of the discharge [277] from the cement hopper? Was it oblong or oval or was it circular, or do you recall?

A. No. I only had—I couldn't get down inside there and see it.

Q. You couldn't get inside to see it?

A. No.

Mr. Lyon: That's all I want to know.

The Court: Do you have any objection?

Mr. Lyon: The shape of that is different. It is not circular. We will establish that. I have no other objection to the drawings.

Mr. Sellers: You are referring to the lower end of the cement hopper?

Mr. Lyon: The lower end of the cement hopper has an oval opening 12 by 24.

(Testimony of Roger Pine.)

Mr. Sellers: Oval rather than circular?

Mr. Lyon: Right.

Mr. Sellers: That is the only difference?

Mr. Lyon: It makes quite a difference, but I will prove that in time.

Mr. Sellers: That is all we have, your Honor. Thank you very much.

The Court: All right. Now you can put your drawings into evidence.

Mr. Sellers: They are in evidence, your Honor, but there [278] might have been some objections later.

The Court: All right.

(Witness excused.)

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Mr. Sellers: Your Honor, my next witness will be Mr. Stromberg, the defendant.

The Court: We have got 20 minutes. Let's put him on the stand.

Mr. Sellers: Very good.

#### MERLE W. STROMBERG

the defendant herein, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, sir.

The Witness: Merle W. Stromberg.

(Testimony of Merle W. Stromberg.)

Direct Examination

By Mr. Sellers:

Q. What is your business, Mr. Stromberg?

A. Steel manufacturer of various types, including ready-mix plants and batching equipment.

Q. Wouldn't steel fabrication really be more accurate? You don't manufacture steel itself? You are a steel fabricator?

A. A steel fabricator in various other items besides [279] ready-mix plants.

Q. And you do build concrete batching plants?

A. Yes.

Q. Mr. Stromberg, I show you Plaintiff's Exhibit No. 1 and ask if this is a drawing which you have prepared? A. Yes.

Q. To what does it relate, please?

A. It relates to an aggregate hopper with partitions and a cement hopper in between.

Q. The cement hopper is partitioned between the aggregate hopper? A. That's right.

Q. Is this a valve we find down at the lower end of the cement hopper?

A. That is a butterfly valve.

Q. Looking at the lower left-hand figure, what do we see down here? Will you please explain that to the court?

A. That is a top view of both hoppers and the partitions.

Q. We find a hopper on the left and a hopper on the right, and then do we find the cement hopper in between the two? A. That is correct.



(Testimony of Merle W. Stromberg.)

Q. Do we find hooks extending up from the cement hopper by which the cement hopper can be independently weighed? [280]

A. That is an indication of where the scales are hooked on.

Q. We don't see any means to connect the beams or scale to the outer hopper, but would such means be provided for the outer hopper?

A. We do see those.

Q. The brackets we see are——

A. That is correct.

Q. All right. To what did this particular drawing relate, Mr. Stromberg?

A. I believe this drawing relates to a typical hopper that we have manufactured. It possibly could be used in one or more plants.

Q. Does it accurately show the relationship of the hoppers at the Stanton plant in Stanton, California?

A. It gives a general idea of the Stanton hoppers.

Q. Who made that drawing, the original of that drawing?

A. The original drawing—this drawing was drawn by Mr. Cover.

The Court: Who is Mr. Cover?

The Witness: He was an engineer for me at that time.

Q. (By Mr. Sellers): It was drawn by one of your employees?           A. That is correct.

(Testimony of Merle W. Stromberg.)

Q. And whose idea was it? Whose design was this? [281]

A. I told him what I wanted and from there he gave me the necessary dimensions across the face and the overall height that I would have to have before it could go to the shop for fabrication.

The Court: When did you tell him that? When did this all occur, do you know? Can you tell by the drawings when it occurred?

The Witness: The exact month, no. This was a little over a year ago.

The Court: A year ago?

The Witness: Yes.

Q. (By Mr. Sellers): This drawing was made over a year ago, the original was made over a year ago? A. Yes.

Q. Is this the first drawing of this type you remember made showing this type of construction?

A. The original drawing or the master drawing could have been made as long as four years ago.

Q. How do you place that time?

A. The first hopper that I built or had anything to do with was in 1950.

Q. In connection with what plant did you make that drawing?

A. The Gardena plant of Mr. Pearman.

Q. That was the first plant of this type that you built? [282] A. That is correct.

Q. Did you and Mr. Pearman work out together the details of this type of construction, or where did you get the design?

(Testimony of Merle W. Stromberg.)

A. I was told what he wanted and I drew it from there.

Q. You had never built a batching plant prior to that time?      A. I had not.

Q. That was your first batching plant?

A. It was.

Q. Had you ever inspected a batching plant prior to that time?

A. I have been in the industry for 25 years.

Q. Please answer my question.      A. Yes.

Q. You had, so that you were familiar with batching plants of different designs?      A. Yes.

Q. Were you familiar with the batching plants of the central hopper type, central cement hopper type?      A. No.

Q. You mean you had been in the batching plant business for 20 years and had never seen that type of plant?      A. That is correct.

Q. Where were you in that business? [283]

A. I have followed dam construction from the time Boulder started until I went into the service, and that is an entirely different type of plant than what we have. All the hoppers are entirely different than what we are talking about here.

Q. You mean in those large operations?

A. That is correct.

Q. Mr. Stromberg, please——

The Court: May I ask you a question? Who told you about putting the cement hopper in the center? Where did you get that idea?

(Testimony of Merle W. Stromberg.)

The Witness: It was advocated that the customer wanted his hopper confined on account of space, and the idea was conceived that the center compartment or central location would be a logical point.

The Court: Who conceived it? Did you or Mr. Pearman?

The Witness: I was told by Mr. Pearman that he wanted his hopper in the center.

The Court: He was the one that told you that?

The Witness: I have seen the Noble construction which it has a hopper in the center, but only suspended on one scale. He wanted to have his center hopper, which is a center—the cement compartment, weighed on a separate scale due to the fact that he wanted to conserve the cement.

The Court: And he is the one who had the idea? It was [284] not your idea?

The Witness: That is correct.

Q. (By Mr. Sellers): Did I understand you to say he wanted to conserve the cement?

A. He wanted to conserve cement.

Q. What do you mean by that?

A. By weighing it on a separate scale, your graduations on a cement scale will be as a normal rule in three-pound graduations instead of 20-pound graduations.

Q. It made possible more accurate weighing?

A. Yes.

Q. And in part made possible conservation of cement? A. Yes.

(Testimony of Merle W. Stromberg.)

Q. Just to clarify my understanding, you had been in this business for 20 years, and at the time you designed this first plant at Mr. Pearman's request, you had never seen a plant of that type?

A. Not a hopper within a hopper.

Q. Nor a plant in which a hopper within a hopper has independent weighing means for the inner hopper?

A. I had not.

The Court: May I ask a question?

This cement hopper within a hopper with an independent weighing mechanism, did the question of putting that upon a scale or in a weighing mechanism present quite an engineering [285] problem?

The Witness: No, it is not.

The Court: Not quite an engineering problem?

The Witness: No, definitely not. It merely means that there are two partitions added to the hopper to divide it so that the cement compartment will hang freely.

The Court: Was it any more difficult to put the cement hopper on a weighing apparatus than it was the other two hoppers, the aggregate hoppers?

The Witness: No.

The Court: So the fact that he wanted a separate weighing apparatus for the cement hopper didn't present any particular problem, is that right?

The Witness: As far as I am concerned, no, sir.

The Court: I thought that would be a problem.

Q. (By Mr. Sellers): I believe you said that he gave you the idea, Mr. Stromberg. Mr. Pearman gave you the idea, so it didn't present a problem to

(Testimony of Merle W. Stromberg.)

you. If it presented a problem to anyone, he had already invented it, is that correct?

A. He did not invent it, as I understand it now.

Q. But as far as you were concerned at that time, he had conceived of that arrangement and he told you about it?

The Court: Mr. Pearman, I don't think ever testified he claimed an invention. He said he developed the idea.

Mr. Sellers: Yes. I used the wrong word, your Honor. I [286] mean as far as Mr. Stromberg is concerned, Mr. Pearman took the idea to him and it was novel to Mr. Pearman. As far as I know, Mr. Pearman doesn't claim to be an inventor either.

The Court: All right.

Q. (By Mr. Sellers): So it is a fact that in this construction we have the cement hopper positioned within the sections of the aggregate hopper and the two hoppers independently weighable, and the cement hopper discharging down through the discharge of the aggregate hopper? A. Yes.

Q. Is that discharge of the cement hopper positioned separately with respect to the discharge of the aggregate hopper?

A. Yes. It is directly above the hopper.

Q. And the discharge itself, when they go down through, isn't that the shaft of cement centrally positioned with respect to the shaft of aggregate?

A. The bottom gate on the aggregate hopper is oblong. The butterfly gate is round.

(Testimony of Merle W. Stromberg.)

Q. I will put it this way. Is not the axis of the cement hopper positioned coaxially with the axis of the aggregate hopper? Are they not the same axis? You understand my language?

Mr. Lyon: I want to be certain he understands what you mean by coaxially. Those are patent attorney terms. [287]

The Court: I might not understand either.

Mr. Sellers: I am sorry, your Honor.

Q. What I want to determine is whether or not if you have the dimensions of your outlet of your aggregate hopper, whether or not a point right in the center of that discharge would not also be the same point, possibly displaced vertically, as the point which is directly in the center of your cement hopper.

A. The center of this opening, which would be here, is directly in the center of the butterfly valve.

Q. Directly below it. That answers my question. Thank you.

Mr. Sellers: I would like to offer in evidence Exhibit No. 6, your Honor.

The Court: It may be received in evidence.

The Clerk: It was received yesterday.

Mr. Lyon: 1, 5 and 8 are in.

Mr. Sellers: I would rather offer them twice than not at all, your Honor.

Q. Mr. Stromberg. I show you a photograph and ask you if you can identify this, what it shows.

The Court: Identify it from the front, not the back.

(Testimony of Merle W. Stromberg.)

The Witness: I am looking at the date.

Q. (By Mr. Sellers): I had in mind the front, Mr. Stromberg. [288]

A. Yes, I can identify it. That is Mr. Pearman's plant in Gardena.

Q. Who took that photograph?

A. I did. I had it taken, I should say.

Mr. Sellers: I would like to offer in evidence Exhibit No. 2.

The Court: It may be received in evidence.

The Clerk: Exhibit 2.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Sellers): I now show you a photograph which has been marked for identification Plaintiff's Exhibit 3 and ask you if you can identify that? A. Yes.

Q. From the front?

A. Yes. I still look at the back.

Q. What is it, please?

A. That is Jones Concrete in Santa Monica.

Q. Did you have anything to do with Jones Concrete in Santa Monica? A. I built this plant.

Q. Did you provide that photograph to this attorney, to the speaker? A. Yes.

Q. Does that plant include a centrally positioned cement [289] hopper between sections of an aggregate hopper with independent weighing means?

A. Yes.



(Testimony of Merle W. Stromberg.)

Mr. Sellers: I offer into evidence as Plaintiff's Exhibit No. 3 the photograph the witness has identified.

The Court: It may be received in evidence.

The Clerk: Exhibit 3.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 3.)

Q. (By Mr. Sellers): Is the plant which you have just referred to, and as shown in the drawing, Plaintiff's Exhibit No. 3, is that plant generally similar to the Stanton plant at Stanton, California?

A. The aggregate bins are identical. The weigh hopper, aggregate weigh hopper, I believe, is a half yard larger, but theoretically it is the same.

Q. Theoretically it is the same? A. Yes.

Q. Thank you. Now, I show you a sheet of yellow——

Mr. Lyon: Pardon me. Can we go a little further than that? There were some other aspects. You asked him if it was identical and I did not receive the answer.

The Court: You can develop that on cross-examination.

Q. (By Mr. Sellers): I show you a drawing which has been marked Plaintiff's Exhibit 4 for identification and ask [290] if you can identify that from the front? A. Yes.

Q. What is it please?

A. At the time this sketch was made by me. I was asked about the receiving hopper at the Stanton plant in Stanton, California.

(Testimony of Merle W. Stromberg.)

Q. Did you make this drawing to evidence the type of construction? A. I did.

Q. Does the drawing show a collector hopper, a doublewall collector hopper, with water coming in at the side and running into that collector hopper?

A. Yes, it does.

Q. And does it show a hopper, aggregate hopper up above the collector hopper which is adapted to discharge down into the collector hopper?

A. Yes.

Q. I don't see, but I ask you, would there be a cement hopper also discharging down into that collector hopper?

A. It would be, because this was taken of the Stanton plant.

Mr. Sellers: I offer into evidence Plaintiff's Exhibit 4, the drawing referred to.

The Court: It may be received in evidence.

The Clerk: Exhibit 4. [291]

(The drawing referred to was received in evidence and marked as Plaintiff's Exhibit No. 4.)

Q. (By Mr. Sellers): I show you a blueprint of a drawing which has been marked for identification as Plaintiff's Exhibit 6 and ask you if you can identify this? A. Yes.

Q. What is it, what does it show, please?

A. It is a plant that we manufactured about three years ago.

Q. What plant is that, please?

(Testimony of Merle W. Stromberg.)

A. I'm sorry. Four years ago. It is now in operation at Lompoc, California.

Q. Was this drawing made for or by you?

A. It was made by me.

Q. Made four years ago? A. Yes.

Q. How does this plant compare in date with the plant which is the Gardena plant?

A. The Gardena plant was manufactured or fabricated in 1950.

Q. This was a later plant, then?

A. Yes. 1952.

Q. I see in the lower right-hand corner the name F. B. Hunter and a figure 2—is that 1952?

A. That is the month of February, 1952. [292]

Q. That would be when this drawing was made, would you say? A. Yes, during that month.

Q. What does this drawing show with particular relationship to the bins and the hoppers?

A. Well, it shows a 500-barrel silo with a transfer screw to the cement weigh hopper, which is weighed independently of the aggregate weigh hopper. The rock elevator, aggregate receiving pit and hopper, cement elevator, and cement unloading screw.

Q. Do we find an aggregate hopper positioned upon both sides of this cement hopper?

A. Aggregate hopper on both sides of the cement.

Q. Did you in this plant provide independent weighing means for the aggregate hopper and for the cement hopper? A. Yes.

(Testimony of Merle W. Stromberg.)

Q. And did the two hoppers, the cement hopper and the aggregate hopper, discharge together down into a collecting bin shown below?

A. They did not discharge together. One discharged ahead of the other.

Q. Wasn't that a matter of how the operator controlled it? Could they not both discharge together? A. Could have been.

Q. It was a matter of election on the part of the [293] operators?

A. It was an election to open both gates at the same time.

Q. That is always true in any plant?

A. Not for proper operation.

Q. Not for proper operation, but it is always possible in any plant, isn't it?

A. It is possible in any plant.

Q. And the cement and the aggregate discharge together down into a collecting hopper down below?

A. Yes.

Q. Did you sell the entire plant to these people who purchased? A. Yes.

Q. You didn't sell just the hoppers or the weighing means, but you sold the entire plant?

A. Yes, and erected the plant, also.

Mr. Sellers: I offer into evidence the exhibit which has been just identified.

The Court: It may be received.

The Clerk: Exhibit 6.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 6.)

(Testimony of Merle W. Stromberg.)

The Court: Now, I notice it is 4:00 o'clock, and as I said yesterday, we like to quit at 4:00 o'clock. After a day [294] in court, I think counsel and also the personnel like to quit promptly.

May I inquire how many more witnesses you have?

Mr. Sellers: Your Honor, I believe this is my last witness unless overnight we have a brainstorm.

The Court: The reason I am asking is that so Mr. Lyon could have notice to proceed tomorrow with his witnesses.

Mr. Sellers: We are working together, your Honor, on a friendly relationship. I believe Mr. Stromberg will be my last witness unless we recall Mr. Tilden.

The Court: There are two attorneys on this case. One of you can go down to this last witness' office and see if you can find any memorandum.

Mr. Sellers: I would like to go, not Mr. Lyon.

The Court: All right. See if you can find any memorandum you think will qualify under the rule.

Mr. Sellers: We will, your Honor. Thank you.

The Court: Court will now stand in recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken to 10:00 o'clock, a.m., Thursday, March 15, [295] 1956.)

Thursday, March 15, 1956—10 A.M.

The Clerk: No, 17,121-HW Civil, C.S. Johnson Company vs. Merle W. Stromberg, et al., further trial.

The Court: Are you ready?

Mr. Sellers: Ready, your Honor.

Mr. Lyon: Yes, your Honor.

The Court: You may proceed.

Mr. Sellers: I should like to offer in evidence, your Honor, as plaintiff's next in order, No. 19, I believe, a manual entitled Concrete Manual, United States Department of the Interior, Bureau of Reclamation. This is the sixth edition, 1955 date, with particular reference to pages 203, 204 and 205, particularly page 204.

I offer this under the provisions of the Federal Code, and particularly Section 1733, which reads as follows:

“Books of records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence, as a memorandum of which the same were made or kept.”

Mr. Lyon: I will object to it, your Honor.

The Court: On what grounds?

Mr. Lyon: I don't think it has any pertinency. I don't see what purpose it is offered for, in the first place, but I [298] don't think this exception covers it.

The Court: Objection overruled. It may be received in evidence.

The Clerk: Exhibit 19.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 19.)

Mr. Lyon: I don't believe that exception covers it.

Mr. Sellers: Mr. Stromberg, please.

### MERLE STROMBERG

the defendant herein, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Sellers:

Q. Mr. Stromberg, you are the defendant in this action, aren't you? A. Yes.

Q. You appreciate the fact that I have a right to cross-examine you as an adverse party?

A. Yes.

Q. You know I have the right to lead you and to lead you into questions, and that you are under the obligation to tell the truth? A. Yes.

Q. You are aware of that fact? [299]

A. Yes.

Q. Mr. Stromberg, I now show you a drawing which for purposes of identification has been marked as Plaintiff's Exhibit No. 7, and ask if you can identify this construction. A. Yes.

Q. What does it comprise, please?

A. It is the batching plant, the bin storage and the cement storage of the Oberg Brothers plant, which I sold to them.

(Testimony of Merle W. Stromberg.)

Q. You sold to them? A. Yes.

Q. Did you construct this plant? A. Yes.

Mr. Sellers: I offer into evidence as Plaintiff's Exhibit No. 7 the drawing which has just been identified.

The Court: It may be received.

The Clerk: Exhibit 7.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Sellers): I now show you another ozalid print of a drawing which for purposes of identification has been marked Plaintiff's Exhibit No. 9, and ask if you can identify this construction.

A. Yes.

Q. What does it show? [300]

A. Complete plant with rock elevator, bin storage, weigh hopper construction, cement silo, cement elevator, and truck unloading screw and transfer screw.

Q. Did you make and sell this plant?

A. This is a drawing of a standard plant. There would be no way of identifying this as a plant that was sold.

Q. Does it contain a cement hopper positioned centrally of the aggregate hopper?

A. This drawing does not indicate it, but it would have aggregate hoppers and scales, as well as cement.

Q. I see. In other words, this drawing shows the exterior construction; the details of the aggregate hopper and the cement hopper are not shown?



(Testimony of Merle W. Stromberg.)

A. That is correct.

Q. However, this is the type of drawing, rather, this is a drawing of the type of plant in which the aggregate construction and the cement hopper construction which we have been discussing here would be incorporated? A. Yes.

Mr. Sellers: I offer into evidence as Plaintiff's Exhibit No. 9 the drawing which has been identified.

The Court: It may be received as Exhibit 9.

The Clerk: Exhibit 9.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit [301] No. 9.)

Q. (By Mr. Sellers): Mr. Stromberg, did you ever see a hopper that did not have a discharge outlet?

Mr. Lyon: Your Honor, may I object to that until he clarifies what art he is talking about? Is he still talking about cement art or something else?

Mr. Sellers: I will limit it to the art of concrete batching.

Q. Did you ever see a concrete batching hopper that didn't have an outlet?

A. A concrete batching hopper?

Q. Yes. A. No.

Q. Did you ever see such a hopper that didn't have a body? A. No.

Q. And such hoppers always have inlets, don't they? A. Yes.

Q. Is it true, Mr. Stromberg, that in the Gardena plant which you constructed for Mr. Pearman that the cement flows into the stream of aggregate?

(Testimony of Merle W. Stromberg.)

A. The stream of aggregate is on both sides of the cement.

Q. Well, now, will you answer my question as to whether or not the stream of cement flows into the stream of aggregate, whether the cement flows into the aggregate? [302] A. No.

Q. Is it a fact, Mr. Stromberg, that you gave a deposition in my office, I believe it was in February of the year 1955?

A. The date I am not sure of, but I was in your office and gave a deposition.

Q. Do you remember that at that time I asked you questions concerning the flow of cement relative to the aggregate?

A. I don't recall the question.

Q. Do you remember that I asked you concerning the Gardena plant, whether or not the cement flowed into the aggregate or not?

A. No, I do not remember.

Q. Well, to refresh your recollection, I will read from page 25 of your deposition given on Tuesday, February 21, 1955, in my office, beginning at line 21.

“Q. All right. Now, to summarize, it appears you are willing to identify the two plants that we have that you have made, the Gardena plant and the Stanton Ready-Mix, is that correct?

“A. That's correct.

“Q. All right. Now, in each of those plants is it accurate to say that we had separate weighing means for the cement and for the aggregate?

(Testimony of Merle W. Stromberg.)

“A. That’s correct. [303]

“Q. Is it accurate to say that in each of those two plants the cement was discharged concentrically within the aggregates?

“A. The cement was discharged from a butterfly valve through a common gate in the aggregate hopper.

“Q. That doesn’t answer my question. I want to know if the cement was discharged physically within——

“A. Well, that did answer it, sir. It is a hopper within a hopper. It is a weighing mechanism by itself which is discharged at the same time or shortly after the aggregate has been discharged through a common gate.

“Q. So that the cement is positioned physically within the other aggregate?

“A. The cement is physically flowing through the other aggregate.

“Q. Concentrically, inside it?

“A. Flowing——

“Q. Answer yes or no, is it concentric?

“A. I wouldn’t use the word concentric.”

I would also like to read to you from the same deposition, page 27, beginning line 20:

“Q. Does the cement hopper feed into the flow of the aggregate? [304]

“A. The cement flows into the stream of aggregate.”

Now, I would like to have you tell us, Mr. Stromberg, whether or not the testimony given at that

(Testimony of Merle W. Stromberg.)

time in which you said the cement flows into the stream of aggregate is accurate or whether or not the testimony given today, when you say it does **not** flow into the stream of aggregate, is accurate.

Mr. Lyon: May I object to that question until he specifies at what point in the apparatus he is talking about? Are you talking about the aggregate hopper or are you talking about the gathering hopper, or some place in between? Or are you talking about in the mixing truck?

Mr. Sellers: He was able to answer that question without difficulty. I read you the question and he answered it at that time.

The Court: Overruled.

Mr. Sellers: Please read the question.

(Question read.)

The Witness: The cement, or, rather, as the aggregate is being discharged from the hopper, such as the Gardena plant, there is an oblong opening on the aggregate hopper which allows the material to flow from two directions, allowing the cement to have a free fall from the bottom of the butterfly valve down to and would go into the stream of aggregate if the fall was far enough, which I believe is about two and a half [305] feet, and within a foot to 18 inches the cement will mingle or go into the aggregate.

Q. (By Mr. Sellers): In other words, your answer given in the deposition is accurate, the stream of cement does go into the stream of aggregate?

A. At a certain point, yes.

(Testimony of Merle W. Stromberg.)

Q. No one asked you about limitations. Thank you.

I now show you, Mr. Stromberg, Plaintiff's Exhibit No. 14, which shows the relationship of the aggregates in the aggregate hopper below the cement in the cement hopper.

Before going into the operation, I believe that counsel yesterday made some mention of the fact that the drawing didn't quite show the proper size for the discharge of the cement. Should it be larger or smaller?

A. The opening at this point for the cement?

Q. Yes. A. That is adequate.

Q. What dimension there isn't quite right, Mr. Stromberg?

A. I haven't—we weren't discussing, I don't believe, sir, Section 33, which is through here, which does not include this discharge gate. You don't see it at this point at all.

Q. Well, as we see it here——

A. That is the butterfly valve.

Q. Yes. Are the dimensions here relatively accurate? [306]

A. Relatively?

Q. Yes, substantially. A. Yes.

Q. Why do you have the side walls of the aggregate batcher here sloping?

A. So that the material on either side will flow freely when the bottom gate of the aggregate hopper is open.

(Testimony of Merle W. Stromberg.)

Q. All right. When you open your bottom gate of your aggregate hopper, doesn't gravity acting upon the aggregate cause that to come tumbling down the side walls in a transverse direction?

A. It does not tumble down. It has a folding action in the material. As the side of the material is sliding down, the center more or less folds over actually and comes on down through the gate.

Q. Would it be a fact that the aggregate on the right-hand side here would come down and, having gained speed in a slanting direction, would tend to continue off toward the center of the gathering hopper?      A. No.

Q. It would not?      A. No.

Q. Would it be a fact that each one of these particles having moved transversely down the bottom here would upon reaching the bottom here immediately turn a corner and go downwardly? [307] Is that your position?

A. The speed is not so that the material will have an opportunity to carry into the center.

Q. Did you ever measure the speed?

A. Measure the speed?

Q. Yes.      A. No.

Q. Have you ever stood and watched some of the aggregate dribble out of a hopper, some of the remaining aggregate, and did it come right to the edge and fall down, or was it not a fact that it came out, slid down this incline, and tumbled over towards the center of the gathering hopper?

A. The remaining aggregate left in the hopper.

(Testimony of Merle W. Stromberg.)

Q. Well, do I understand you to say that the remaining aggregate would act in one way, and when there is more aggregate in there, it acts in another? A. Yes.

Q. Do I understand you to say that part of the aggregate is acted upon by gravity and part of it isn't?

A. It is all acted upon by gravity.

Q. Have you ever seen a ball roll down a roof, Mr. Stromberg? A. Yes.

Q. When that ball reaches the edge of the roof, does it go vertically downward from the very edge of the roof, or does [308] it describe an arc off the edge of the roof, so that it actually falls and strikes the ground, not right vertically below the edge of the roof, but off a space from the edge?

A. A space off.

Q. Why would not a piece of rock in this aggregate sliding down this inclined surface do the same thing?

A. It is very possible that it would have a slight movement off to a vertical position, but I doubt if anyone could ever measure it.

Q. Well, no one asked you to measure it. You seemed to know that it fell straight down, and I want to know why you know that it falls straight down. A. At this point.

Q. All right. Now, let's just take a piece of aggregate, rock in here, that comes sliding down this side wall. A. By itself?

Q. I don't care. We will put it by itself.

A. All right.

(Testimony of Merle W. Stromberg.)

Q. It slides all the way down from here, it slides down this incline. Do you mean to say that hitting here, it will then go straight down, or will it not go in an arc and tend to hit the center here?

A. A piece of aggregate sliding down that slope by itself will arc and be quite some distance from the edge.

Q. And wouldn't every other piece of aggregate in there [309] having the same direction of movement tend to do the same thing?

A. Not every piece.

Q. Well, which piece of aggregate wouldn't?

A. The mass of aggregate will have a tendency to drop vertically.

Q. How did this material get over here in the center?      A. How did it get over there?

Q. Yes, the aggregate.      A. The rock——

Q. Oh, I beg your pardon. Let's don't charge it. It is in the hopper. How did it get from up here down here? You have aggregate in the hopper. I want to know how does it happen there is any aggregate below the cement hopper?

A. Yes, there is aggregate.

Q. How did it get there?

A. It hit the sides of the weigh hopper and due to the fact that there was a void, it filled that void.

Q. All right. Now, we have aggregate sliding along the inclined surface. We have other aggregate on top of that?      A. Yes.

Q. It is all tending to move down under the action of gravity?      A. Yes.



(Testimony of Merle W. Stromberg.)

Q. All right. Wouldn't the part on top form an upper [310] layer which would tend to move in the same general direction as the layer on the bottom? You have said that one piece would tend to be projected in an arc, and I ask you why another piece on top of that wouldn't tend to be projected in the same arc.

A. In a mass form I don't think it would be visually possible to determine the arc the mass would move toward the center.

Q. You are not a physicist, are you, Mr. Stromberg?

A. I am not, sir.

Q. You are basing your opinion there upon what?

A. Practical experience and knowledge of batching equipment.

Q. Have you ever looked inside of the aggregate hopper to see what these pieces did up above that sloping surface?

A. Yes.

Q. How did you look in there? From the side view?

A. No, from the top.

Q. You looked in from the top, and all you could see was the top surface, wasn't it?

A. Yes.

Q. All right. So that you didn't know what these pieces were doing down here in the bulk of that aggregate, did you?

The Court: Do you know? [311]

Mr. Sellers: No, but I am not the witness, your Honor.

(Testimony of Merle W. Stromberg.)

The Court: Does anybody know? Nobody has been down there. You can't see.

Mr. Sellers: Your Honor, the fact of the matter is that this is a simple matter of physics, that if you have a sloping surface here and you have a mass going down that sloping surface——

The Court: There will be a slight arc, that is right, slight arc, and this witness says it is so slight that you can't measure it.

Q. (By Mr. Sellers): Did you ever try to measure the arc, Mr. Stromberg?

A. I had no reason to.

Q. You never tried to? A. No.

Q. When you say a slight arc, how slight do you think it is?

The Court: Have you got any evidence to show what that arc is?

Mr. Sellers: I have evidence to show that there is mixing taking place here and the aggregate is projected down into the center, and that the cement falling into it will mix with it, your Honor.

The Court: I know, but that doesn't say the extent of the arc. [312]

Mr. Sellers: Well, I think, your Honor, it is important to determine that the aggregate just doesn't hit the edge here and fall straight down.

The Court: Are you trying to convince this witness or me?

Mr. Sellers: I would like to convince you, your Honor.

The Court: I am convinced there is probably a small arc there.

(Testimony of Merle W. Stromberg.)

Mr. Sellers: You are convinced there is a small are?

The Court: I am convinced there is aggregate coming down both sides and they hit in the middle.

Mr. Sellers: And you are convinced of that?

The Court: In the middle and they go down.

Mr. Sellers: And you are convinced, also, if I may ask, that the cement falls into that body of aggregate which is meeting along the middle?

The Court: That's right, they commingle.

Mr. Sellers: Fine. Thank you, your Honor.

Q. You built the Gardenda plant, you said, Mr. Stromberg. Where did you say you got that design?

A. The design of the plant was drawn by an engineer that formerly had worked for Conveyor Company.

Q. It was drawn, but where did you get the design?

Mr. Sellers: I wish just to make the point, where did he get it, not where anyone else got it, but where he got it.

Mr. Lyon: I believe he testified to that yesterday afternoon. [313]

The Court: I think he testified to it. I think you are going over the same ground.

Mr. Sellers: All right. I just want to make it clear.

Q. Did you say you got it from Mr. Pearman, that he gave you the design, is that correct?

A. He did not give me the design of the plant. He gave me his idea of what he wanted, as far as

(Testimony of Merle W. Stromberg.)

the aggregate and cement hoppers was concerned, and the cement and aggregate scales.

Q. He told you what he wanted?

A. But he did not design the plant.

Mr. Lyon: I object. This is going over the same ground he testified to yesterday.

The Court: Objection overruled.

Q. (By Mr. Sellers): Did I understand you to say, also, yesterday that prior to the time you made the Gardena plant, you had never seen a plant in which the cement hopper was positioned physically within the aggregate hopper, the two being independently weighable? Is my recollection right on that, did you say that? A. I did.

Q. Do you remember when you were giving your deposition in my office, Mr. Stromberg, I asked where you got the design for the Gardena [314] plant? A. I do not recall the question.

Q. I asked you:

“Q. Where did you get the design for the Gardena plant?

“A. The weigh hopper was, I believe, designed by an employee or former employee of Conveyor Company.

“Q. And where did he do that work?

“A. Where did he do the designing?

“Q. Yes.

“A. I think in his home, to the best of my knowledge.

“Q. What was his name?

“A. Well, I wouldn't know. The prints were

(Testimony of Merle W. Stromberg.)

made up and handed over to the subcontractor, you might call him, and the plant was fabricated from there.”

Now, I would like to know, did you get the design from Mr. Pearman, as you said yesterday——

The Court: The testimony by Mr. Pearman was that he had the idea and Mr. Pearman didn't draw the design.

Mr. Sellers: No, your Honor——

The Court: This witness testified Mr. Pearman gave him the idea.

Mr. Sellers: Yes. [315]

The Court: If I remember the testimony correctly, after Mr. Pearman gave him the idea and told him what he wanted, he went and had the design made.

Mr. Sellers: Your Honor, I think there is possibly a misunderstanding in words and maybe that is an excuse, but design is merely the physical embodiment of the idea. In other words, you have an idea——

The Court: Mr. Pearman said, “I had the idea.” He never said he drew the design. He said he had an idea and gave it to the defendant and the defendant went ahead and followed the idea.

Mr. Sellers: All right. You distinguish between the drawing and the mental concept.

The Court: Mr. Pearman never said he drew any plans.

Mr. Sellers: No, he didn't, your Honor. He said he had the idea.

(Testimony of Merle W. Stromberg.)

The Court: He said he had the idea.

Mr. Sellers: And gave it to the witness.

The Court: And the witness then proceeded with that idea and drew up the plans, as I understand it?

Mr. Sellers: Yes.

The Court: All right.

Mr. Sellers: It is my understanding from the testimony I have just read, your Honor, that the design for the plants came from a man who formerly worked for the Conveyor Company, [316] and I think that it is possible and, in fact, probable that the design embodied the ideas of the man who drew it up.

The Court: Well, we have got Mr. Pearman's testimony that he is the one who implanted the idea in the defendant's mind.

Mr. Sellers: Yes.

Q. Do you know whether or not it is a fact, Mr. Stromberg, that Conveyor Company prior to that time had built plants having a centrally positioned cement hopper and side positioned aggregate hoppers? A. Repeat the question, please.

(Question read.)

A. I do not recall the Conveyor Company building an aggregate hopper with the cement compartment in the center, on separate scales.

Q. By that you mean you never saw one of the plants they built?

A. I don't recall of seeing one prior to 1950. It is possible that the cement hopper would have

(Testimony of Merle W. Stromberg.)

been on the outside, or it is possible that it could have been on the inside, but I do not recall of a definite plant whereby they had the aggregate or cement hopper within and on a separate scale.

Q. But you do remember you never saw such a plant, either built by Conveyor or anyone else prior to the time you built the Gardena plant? [317]

A. To the best of my knowledge, I do not.

Q. Are you pretty certain about that?

A. I am.

Q. You are positive? A. I am.

Q. Is it a fact that as a general rule the batching plants which you have built, the cement was weighed in its own hopper in the center?

Mr. Lyon: May I have that question read?

(Question read.)

The Court: As I understand, the first batching plant you built was at the Gardena plant?

The Witness: That is correct.

The Court: After the Gardena plant was built and you built subsequent plants, did you always put the cement hopper in the center?

The Witness: Not always.

Q. (By Mr. Sellers): Did you as a general rule?

A. There were a number of plants whereby the cement was positioned in the center on a separate scale.

Q. Well, I would like an answer to my specific

(Testimony of Merle W. Stromberg.)

question, whether or not as a general rule you positioned it in the center.

Mr. Lyon: I object to that, your Honor, until we have some definition of what he means by general rule. [318]

The Court: Overruled.

Mr. Lyon: There is no showing whether the witness and he are thinking of the same thing.

The Court: Overruled.

The Witness: I would have to presume you are wanting me to give a percentage as to the number of plants I have built that have hoppers, separate hoppers for the aggregate and cement, in comparison to the total amount.

Q. (By Mr. Sellers): I don't want you to presume. A. I would say 50 per cent.

Q. Well, then, you would say it was not the general rule, it was about half the time?

A. Yes.

Q. I would like to read to you your answer to that question that you gave in the deposition above referred to.

"Q. Was the cement positioned centrally with respect to the other material being discharged?

"A. As a general rule, the cement was weighed or had a common hopper of its own in the center."

Mr. Lyon: If this is for the purpose of impeachment, your Honor, I would like to object to the form of the question. The question at that time was as to—what was it?



(Testimony of Merle W. Stromberg.)

Mr. Sellers: February, 1953, about three years ago. [319]

Mr. Lyon: Your last question was dated as of this date. The so-called general rule can change in a year.

The Court: Overruled.

Q. (By Mr. Sellers): It is a fact, is it not, Mr. Stromberg, that you can build two-scale plants that do not embody the cement hopper in the center?

A. It is a fact.

Q. Then how does it happen that in the plants you have built which, depending upon which statement we accept, you either put the cement in the center as a general rule, or 50 per cent of the time, how does it happen you put the cement in the center such a large part of the time?

A. It depends on the design of the plant, and if space is a particular item to be considered. Also, if the customer wants two scales, one for cement and one for aggregate.

Q. All right. At the Stanton plant was there any necessity of conserving space?

A. As far as area is concerned, no.

Q. Can't you have separate scales without putting the cement in the center?

A. You can have.

Q. Then I would like to have you answer my question, why it is that you prefer to put the cement in the center, even though you have separate scales, and even though you may not have any shortage of room? [320]

(Testimony of Merle W. Stromberg.)

A. The construction of the plant, you don't have to build it so wide, for one thing, and you don't have to raise it in the air another two or three feet to get the proper flow or angle for the cement to flow into your gathering hopper.

Q. In other words, the center position of the cement hopper gives you certain advantages that you find desirable, is that correct?

A. It does regardless of whether it has a scale or doesn't have a scale.

Q. Would you say it enabled you to build your entire plant lower, cut down the height?

A. I would say I can conserve about two feet and a half.

Q. Would you say that it enabled you to use less steel in building the plant?

A. That would be a minimum of cost.

Q. It enables you to operate the plant at less cost because you don't have to lift the material, so high, isn't that right?

A. No.

Q. Now, just a minute. If the plant is lower, you don't have to lift the materials as high, do you?

The Court: You are talking about two feet now.

Mr. Sellers: Your Honor, I would point this out to you. If you had to go two feet, with tons and tons of material, it [321] ceases to be two feet. It becomes a great deal of work and becomes very expensive, as any expert in this field will testify. Actually, two feet——

The Court: We have got an expert here.

Mr. Sellers: He is not my expert, your Honor.

The Court: You said any expert.

(Testimony of Merle W. Stromberg.)

Mr. Sellers: I mean this is one of the defendants, your Honor, the defendant. I prefer not to make him my expert.

Q. If the two feet isn't important, why did you mention it, if that isn't one of the reasons you put the cement in the center, why did you bother to mention that? Is it important or isn't it?

A. I don't think it is important.

Q. Then why did you mention it as one of the reasons for putting the cement in the center?

A. The height of the aggregate elevator would be increased two feet and your normal flow of your material from your swing spout on top of the plant into the two outside bins can either be two feet off from the bin, or you can have the chutes directly down on top of the bin, or almost on top of the bin. That two feet could be taken up in the rock elevator itself. Although the plant can be raised, you would not have to raise the height of the rock elevator and still you would get the same discharge into any one of the four compartments.

Q. Do I understand you just got into the habit of making [322] the plants two feet lower? You don't consider it to be important, but you just do that because you got in the habit of it?

A. I believe one of the drawings you just showed me——

Q. I would like to have my question answered.

A. I believe one of the drawings you just showed me this morning would show that there is a concrete footing underneath each column of the plant.

(Testimony of Merle W. Stromberg.)

Mr. Sellers: I move that answer to be stricken, your Honor. It is not responsive.

The Court: It may go out.

Q. (By Mr. Sellers): Now, I would like to have you answer my question.

Mr. Lyon: If allowed to complete the answer, I think there is the point you are driving at.

The Court: Well, he didn't answer the question, except indirectly. He can answer the question and then he can explain the answer if he wishes.

Q. (By Mr. Sellers): You have mentioned in addition to the decrease in height which you gave as a reason for using the cement in the center and then said it was not important, you also gave the matter of the flow of cement into the plant as being a feature concerning which you gained advantage by the center positioned cement hopper.

Explain that, if you will, please. [323]

A. Well, you reduce the size of the gathering hopper in diameter, if it is a round one, or it could be an oblong gathering hopper, if the cement is positioned in the center. It will allow your gathering hopper to be a great deal smaller.

Q. And what is the difference there? Of what importance is that?

A. Well, the importance there, I believe, would be the controlling the aggregate in the gathering hopper a little bit better.

Q. Controls the aggregate in the gathering hopper better?

A. That's right, if it is smaller.

(Testimony of Merle W. Stromberg.)

Q. If it is smaller. All right. Does it have any other advantage in making the gathering hopper smaller?

A. By making the aggregate hopper smaller, you——

Q. Not the aggregate hopper, the gathering hopper.

A. I am sorry. By making the gathering hopper smaller, it will decrease actually in the overall height of the plant, too.

Q. In other words, you cut down the overall height of the plant then by virtue of the fact that the gathering hopper is smaller. Why is that?

A. I believe I just answered that.

Q. You have said the fact that the gathering hopper is smaller makes it possible to lower the plant, I believe? [324]

A. Yes.

Q. All right. I ask you why, how?

A. By reducing the height, you are not using the footage of steel as far as structure is concerned.

Q. All right. In other words, it does effect a saving through reducing the size of the gathering hopper and further reducing the size of the plant, is that correct?

A. Yes, a minimum.

Q. Now I ask you, you stated that by having a smaller gathering hopper, you actually protected the aggregate. Isn't the cement protected?

A. The cement is proportioned, ribboned from the center compartment where the cement is down through.

(Testimony of Merle W. Stromberg.)

Q. What do you mean by ribboned?

A. Well, by using the butterfly valve, you have a ribbon effect on your cement.

Q. Supposing you open the valve completely, do you have any ribbon effect?

A. When you open the valve completely, the valve itself is in a vertical position. You have a stream then.

Q. All right. So that the ribbon is only something that is incidental, depending upon whether you position the valve in a partially open position or not?

A. It is very important, because it is controlled by the operator. [325]

Q. Yes, but he need not have a ribbon if he doesn't want it, need he?

A. If he is discharging his aggregate and cement at the same time, he ribbons the aggregate as well as the cement.

Q. Will you please answer my question? Does he need to have a ribbon if he doesn't want it? Can he open his valve and discharge the cement and aggregate together?

A. Yes.

Q. And open the full width of the discharge?

A. Yes.

Q. And you don't have a ribbon then, do you?

A. You have a flow.

Q. Answer my question. You don't have a ribbon, do you?

A. No.

Q. Thank you. All right, now, I want to get back to the point you said you protected the aggregate

(Testimony of Merle W. Stromberg.)

gate by making the hopper smaller. I asked you whether or not you didn't also protect the cement. I don't believe I received an answer to that.

The cement is really the valuable subject here. It costs much more than the aggregate, does it not?

A. Yes.

Q. Now I want to know whether the cement isn't protected in the smaller hopper from being lost, being blown away, or [326] from any other disadvantage?

A. I don't see what protection you would have unless there was a shroud between the gathering hopper and the weigh hopper.

Q. Will you kindly explain, then, why it is the smaller hopper is able to protect the aggregate and is not able to protect the cement?

A. Well, it does protect the cement.

Q. Thank you. I thought you said it didn't.

A. It does protect the cement, but if you have a shroud completely around the gathering hopper attached to your weigh hopper, a flexible shroud, you have 100 per cent protection.

Mr. Sellers: I move the last be stricken as not responsive, your Honor.

The Court: Denied.

Q. (By Mr. Sellers): Now, I would like to know, supposing instead of having a central feed for the cement, as you have here in the Stanton plant, you have the cement come in from the side in a side feed down into this gathering hopper. would you please describe the action that takes

(Testimony of Merle W. Stromberg.)

place in that event? To make it clear, the cement comes in from the side of the gathering hopper in a side feed plant. Is that typical of a side feed plant? A. That could be typical. [327]

Q. So that instead of the cement coming down through the center as we have it here in the Stanton drawing, Exhibit No. 14, it comes in and comes down the side of the hopper, and that would also be at one side of the stream of aggregate, would it not? A. Yes.

Q. Do you know what happens down in the gathering hopper under those conditions?

A. Your stream of aggregate would be flowing directly down and your cement would be coming in from a side angle.

Q. What happens to the cement?

A. There would be a portion of the cement dust that would gather or collect around the gathering hopper.

Q. In other words, the stream of aggregate going down through the gathering hopper would cause the cement coming in at the side to be formed into dust and you would lose a lot of cement, would you not?

A. No, you would not lose a lot of cement, but you would have a dust problem.

Q. Well, what forms the dust?

A. It doesn't take a great quantity of cement to make a lot of dust.

Q. Well, I want to know what forms the dust?

A. Cement and dry aggregates, if you have dry aggregates. [328]



(Testimony of Merle W. Stromberg.)

Q. In other words, with the cement coming down the side and striking the stream of aggregates, some of the cement is formed into dust?

A. It will develop a dust before it ever hits the aggregate.

Q. Upon striking the aggregates, will it form more dust?

A. No; I don't believe it would, because there is moisture in the aggregate, and I believe it would more or less control it to a certain extent.

Q. Let's assume that the aggregate isn't moist. What happens then?

A. I wouldn't say that the dust would increase. I think it would remain about the same.

Q. In other words, you would get about the same amount of dust, say, sliding the cement down the side of the hopper as you would having a fast dropping stream of aggregates going right by it, the same amount of dust in each case?

A. If the cement is being discharged into the side of the gathering hopper; yes.

Q. In the Stanton plant type of construction, Exhibit No. 14, where the aggregate is positioned around and encircles the stream of cement, even though there is intermingling, as you have stated, would it not be a fact that you would have aggregate around the sides of the cement and that therefore [329] you would have less forming of dust?

A. They still have a dust problem. It is very possible it does cut the dust down a little bit.

(Testimony of Merle W. Stromberg.)

Q. Now, I don't want a probable. I want to know whether or not you have observed this type of plant in operation and whether or not you don't know as a matter of fact.

A. I do know; yes.

Q. And it does cut it down; doesn't it?

A. Yes; it does.

Q. Referring now to this Exhibit 14, would you please, with a pencil, mark on the Fig. 3 the approximate size of the opening which you believe should be there, rather than the opening which is now present, if you can?

A. Opening of what?

Q. I don't know. I believe Fig. 3 is not quite accurate according to your understanding, and I would like to have you indicate just where you think it should be changed.

The Court: You will have to mark it so it can be seen.

Mr. Denny: What do you say we make an overlay on that?

Mr. Sellers: All right, if you have transparent paper, you can indicate on there, can't you, with the pencil?

The Witness: Yes.

Mr. Sellers: And we can darken it later, your Honor.

(Witness complying.)

Q. (By Mr. Sellers): You have drawn two parallel lines [330] on Fig. 3 of Exhibit 14, Mr.

(Testimony of Merle W. Stromberg.)

Stromberg. What did you intend to indicate by those two parallel lines?

A. The opening, or the gate, rather, at the bottom of the aggregate hopper.

Q. Would that change the operation of the construction, in your opinion?

A. It changed the construction.

Q. In what way?

A. Instead of having round openings as indicated in Fig. 3, my discharge gate on the aggregate is an oblong gate 12 inches by 24 inches.

Q. Is it not a fact that the round member shown in the center, I think the fact is that the round opening shown in the center is the butterfly valve in the cement hopper, Mr. Stromberg?

A. That's right.

Q. Actually, you don't see the valve. The valve is down below the aggregates that you see in Fig. 3, if I am not mistaken.

A. I do not have a straight solid line there. I have a broken line which indicates my gate below.

Q. In other words, the drawing is not inaccurate, but, in other words, you merely would like to have shown something that is down below the aggregate?

A. That is the complete description then of Fig. 3 taken [331] at this elevation.

Q. Taken at that elevation. At that elevation, what you see on that elevation, without going below, Fig. 3 is accurate; is it not?

A. That is correct.

(Testimony of Merle W. Stromberg.)

Q. It has been suggested by counsel, Mr. Stromberg, if you will make an overlay of the change you put on Fig. 1 there, mark the outside dimensions, then you can check it on another figure and see if it is accurate.

Mr. Denny: Just draw the same lines there as you would like to have them appear here, and you can check them for accuracy. For example, if these lines here take a certain position, they should correspond with the discharge here, if it is correct.

Mr. Sellers: The point, your Honor, not that it is important, but the lines Mr. Stromberg has drawn, the dotted lines, are not seen looking down here. This is a view looking down.

The Court: But he didn't make the drawing. He is just saying how the drawing should have been made according to his opinion.

Mr. Sellers: That is correct. If any importance is attached in that change from the standpoint of operation, we would like to know it.

The Court: I don't know whether it is important or not. [332] I don't know what difference it makes.

Q. (By Mr. Sellers): Mr. Stromberg, do you view that change as being of any importance?

The Court: I don't know how it is going to affect this case in any way. It may be important in how the plant operates, but as far as this case is concerned, I don't know how it is going to affect it.

Q. (By Mr. Sellers): Do you know how the change in dimensions you have identified there,

(Testimony of Merle W. Stromberg.)

Mr. Stromberg, would have any effect upon the operation of the cement hopper or the discharge of the aggregate hopper? Would they not discharge the same way?           A. Yes.

Q. Thank you very much. In addition to the Stanton plant, Mr. Stromberg, did you also make a Jones Concrete Plant in Santa Monica?

A. Yes.

Q. Is it not a fact that the Jones plant is, member for member, almost identical to the Stanton plant?

A. On the bin structure, the rock elevator, the weigh hoppers and the scales; yes.

Q. So that everything that we are concerned with in this action, we have discussed here, substantially member for member, the Jones plant is identical with Stanton?

A. The Jones plant is identical, member for member, on [333] the aggregate weigh hopper and cement weigh hopper.

Q. And their relationship as shown in Exhibit 14?           A. Yes.

Q. Did you make a plant located in Culver City, Mr. Stromberg?           A. Yes.

Q. Was it the same type as the Stanton plant?

A. No.

Q. Did it have a central hopper, cement hopper, with side aggregate hoppers?           A. Yes.

Q. Independently weighable?           A. Yes.

Q. Would not Exhibit 14 here identify the type of construction you had in the Culver City plant?

(Testimony of Merle W. Stromberg.)

A. It would identify the aggregate hoppers and the cement hopper.

Q. And its type of operation was similar to the operation we have been discussing in connection with the Stanton plant?

A. Yes; outside of the gathering hopper.

Q. Is it true you sold a plant of this type to Oberg Brothers in Los Angeles?

A. Yes; outside of the gathering hopper.

Q. Is it true you sold such a plant to the S. P. Milling [334] Company in Santa Maria, California?

A. No.

Mr. Lyon: Your Honor, may I inquire of counsel as to the purpose of this? My understanding is there will be an accounting for damages if there is any liability later. He is just asking him if he built such and such a plant.

The Court: Well, I am wondering. It seems to me you have established that there are at least several plants here that are similar to the patented plant. Do you have to go any further?

Mr. Sellers: Your Honor, I am quite willing to drop this line if it is understood we have only proved an example and the matter of damages depends on the extent of the infringement. I don't need to push the questions further along this line with that understanding.

Q. I would like to ask one more question concerning the building of the Gardena plant. Did you, prior to the time you built the Gardena plant, ever

(Testimony of Merle W. Stromberg.)

see a weigh batcher in which the cement was discharged into the center of the aggregate discharge?

A. Would you repeat the question?

Q. Did you, prior to the time you built the Gardena plant, ever see a weigh batcher in which the cement was discharged into the center of the aggregate discharge?

A. Yes. They were on the same scale. [335]

Q. In other words, they had a central discharge all on one scale? A. Yes.

Mr. Sellers: Any examination, Mr. Lyon?

The Court: Well, it is 11:00 o'clock, and I think we will take the morning recess. We will now recess until 10 minutes after 11:00.

(Recess.)

The Court: You may proceed.

Mr. Lyon: At this time, your Honor, I would like to inquire as to the procedure your Honor desires to follow. Do you want me to take Mr. Stromberg off the stand and put him back on later? I have a lot of things Mr. Sellers has not gone into. Or do you want me to cross-examine him on what Mr. Sellers has inquired about?

The Court: It doesn't make a particle of difference to me.

Mr. Lyon: I would just as soon take him off the stand, assuming I am not waiving any opportunity to go into these matters if I put him on in my case.

(Testimony of Merle W. Stromberg.)

The Court: As far as I am concerned, you are not waiving anything.

Mr. Lyon: Then I have no questions.

The Court: You may step down.

(Witness withdrawn.) [336]

Mr. Sellers: Mr. Pinne, will you take the stand, please?

### DOUGLAS E. PINNE

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Douglas E. Pinne.

The Clerk: Will you spell your last name?

The Witness: P-i-n-n-e.

### Direct Examination

By Mr. Sellers:

Q. Mr. Pinne, in your testimony the people over at the attorneys' table want to hear what you say, so will you speak a little louder, please?

Mr. Pinne, what is your occupation, please?

A. I am a superintendent of a rock concern in Southern California.

Mr. Lyon: I can't hear what the witness is saying.

The Court: You will have to speak up a little louder.



(Testimony of Douglas E. Pinne.)

The Witness: I am superintendent of distribution for one of the rock companies in Southern California.

The Court: Well, is it a secret?

The Witness: No, sir. [337]

The Court: Which one is it?

The Witness: Consolidated Rock Products.

The Court: Consolidated Rock Products. All right.

Q. (By Mr. Sellers): How long have you held that position, Mr. Pinne?

A. For about eight years.

Q. In that position do you have charge of ready-mix batch plants? A. Yes, sir.

Q. About how many? A. At present, 23.

Q. Do you also have charge of the trucks of the type that carry the mix from the plant to the job?

A. I am responsible for the concrete that is hauled in the ready-mix trucks.

Q. And about how many of those do you have?

A. I believe, at present, 230.

Q. In order to give the court some of your background, I wonder, Mr. Pinne, if you will be so good as to give some of your experience in this field in order that the court may know how much weight to give to the evidence that you are about to give. Going back, let us say, to your job as a weigh master, when was that?

Mr. Lyon: May I inquire, sir, are you trying to qualify this man as an expert? [338]

Mr. Sellers: No; I am not trying to qualify him

(Testimony of Douglas E. Pinne.)

as an expert except to this extent. I am going to ask him some opinion questions, and to that extent he will be an expert; but he is also here as a fact witness, the type his Honor wanted, witnesses who not only had seen the theory but had stood beside the truck, and this gentleman has stood beside the truck. I am trying to give the court—

The Court: Go ahead. There is no objection.

Q. (By Mr. Sellers): Will you please state your background, Mr. Pinne?

A. I started to work for the predecessor of Consolidated Rock in March, 1925, as a public weigh master. Through the years, I did different jobs within the company from a weigh master to equipment operator, and finally ready-mix concrete came along, and in its infancy we built our own plants—our plant in those days.

Along about, I believe, 1933, I accepted a position. I passed a civil service examination with the State of California and was with the Division of Highways for a year.

Q. In what capacity?

A. Equipment and maintenance.

Q. What type equipment?

A. All types for the State, whatever they happened to have in that district.

Q. Were you a shovel operator back in about 1933-1934? [339]

A. That's right.

Q. And around 1934-1935 were you a batching plant operator?

A. Again with this company.

(Testimony of Douglas E. Pinne.)

Q. With the Consolidated Rock Products Company?      A. That's right.

Q. Just for the record, how big a company is Consolidated Rock Products Company, relatively? Is it one of the big ones in the country?

A. It is the largest west of the Mississippi.

Q. Back in 1934 and 1935, what type of a plant was it at that time? Was it a single stop plant or what type?      A. Well——

Q. Or multiple stops?      A. Multiple stops.

Q. And then in 1935-1936, you became a shovel operator again; did you?      A. That's right.

Q. That was loading rock and gravel and that sort of thing?      A. That's right.

Q. Then about 1936 to 1944, what were you doing in that period?

A. Back in maintenance and repair and erection of later-type batch plants. [340]

Q. For what company?

A. Consolidated Rock Products.

Q. Did you come in contact with all types of batching equipment at that time?

A. Practically all the time.

Q. Did you come into contact with the various types of concrete conveying means, including mix trucks and dump trucks?      A. Yes.

Q. Then from 1944 to 1946, what were you doing in that period?

A. I was in business for myself in the ready-mix concrete.

Q. Were you operating a plant?

(Testimony of Douglas E. Pinne.)

A. Yes.

Q. And then from about 1946 to—put it this way, when did you go to work for the Consolidated Rock Products Company the last time?

A. In December, 1947, I believe.

Q. Would you like to think about that? Are you sure of that date? A. 1948.

Q. Thank you. At the time you went to work for the Consolidated Rock Products Company on December 1, 1948, how many batching plants did the company have at that time?

A. I believe approximately 11. [341]

Q. Eleven. Did you at that time take your present job as superintendent of distribution?

A. Approximately the same job I had.

Q. Were these various plants under your control and direction? A. Yes.

Q. Were these plants of different types?

A. Just about every type.

Q. About every type. Were some of the plants of the type having a central cement hopper with aggregate hoppers at the side? A. Yes.

Q. Were some of the plants the type having the cement hopper outside and at one side of the aggregate hoppers? A. Yes.

Q. Did you operate these plants? A. Yes.

Q. Did you watch them while they were in operation? A. I did.

Q. Was the operation of these plants under your control and direction? A. It was.

Q. At that time how many, approximately, con-

(Testimony of Douglas E. Pinne.)

crete carrying trucks were under your control and direction?

A. I believe at that time we had 65. [342]

Q. 65. Did you come into intimate contact with these trucks? A. Yes.

Q. Was their operation and repair under your control and direction? A. No.

Q. What connection did you have with them?

A. Responsibility of the proper concrete or mix, may I say, getting inside of those trucks.

Q. Did you come in contact with them in the operation of the batching plants? A. Yes.

The Court: May I ask the witness a question?

Mr. Sellers: Surely.

The Court: When did you first obtain any knowledge of the Johnson batching plant? What was your first knowledge of the Johnson batching plant?

The Witness: I first came in contact with it in about 1948, to have a real knowledge of it.

The Court: Well, I didn't mean real knowledge. When did you first know there was a Johnson batching plant?

The Witness: Well, of course, in the trade journals I have read their advertisements for a number of years.

The Court: When did you first see one, then?

The Witness: Let's see. This is 1956. [343]

The Court: Speak up loud so the attorneys can hear you.

(Testimony of Douglas E. Pinne.)

The Witness: Well, to be safe, I will say in 1948.

Mr. Sellers: May I suggest, your Honor, that possibly you might refer to plants of the Conveyor Company type. Does that take the date back?

The Court: Now, just a minute. You say that in 1948 there were 11 batching plants, Consolidated had 11 batching plants.

The Witness: That's right.

The Court: These 11 batching plants in 1948, how many of them had the concrete bin, the concrete in the center of the gravel and sand?

The Witness: I believe there were six at that time of the 11.

The Court: Six?

The Witness: I believe so.

The Court: Do you know when those six were first installed?

The Witness: No; I do not know when they were installed, because they were bought second-hand, some of them, and two of them were built new. I do not remember the dates.

The Court: In 1934 and 1935, you said that there were some batching plants there that you had supervision of.

The Witness: No; I had no supervision in those days. I was a batch operator. [344]

The Court: You were a batch operator?

The Witness: Yes.

The Court: When you were a batch operator,

(Testimony of Douglas E. Pinne.)

did you operate a plant where the cement was in the center?

The Witness: No; not at that time.

The Court: When did you first come in contact with any batch plant where the cement was in the center?

The Witness: I would say along about 1940.

The Court: 1940. Speak up loud, now.

The Witness: About 1940, I believe. I am not positive without looking over my old payroll sheets and the like of that to refresh my memory. I had no idea I was going to be here today.

The Court: Your best recollection is that you——

The Witness: I believe so.

The Court: ——you didn't come in contact with batching plants that had the cement in the center until about 1940?

The Witness: Yes. I think that is pretty close, I believe, as close as I can recollect.

The Court: Did you have any at the Consolidated at that time?

The Witness: In 1940? Yes.

The Court: You don't know how long they were there?

The Witness: No; I do not, because before that I was at one place rather than in charge of anything. [345]

The Court: All right.

Q. (By Mr. Sellers): When you went to work for Consolidated on January 1, 1948, they did have

(Testimony of Douglas E. Pinne.)

batching plants of the type in which there was a central cement hopper with an aggregate hopper on the side of that?      A. Yes, sir.

Q. Was it or was it not a fact that Mr. Merle Stromberg was employed by that company at the time you went to work there?      A. Yes, sir.

Q. And was it not a fact that Mr. Merle Stromberg remained employed with that company for a period of 21 days after you went there and quit the company to the best of your information and belief on December 21, 1948?      A. Yes, sir.

Q. And at the time, to repeat, there were in the Consolidated Rock Products Company's business and under your charge plants of the type in which there were a centrally positioned cement hopper and aggregate hoppers at the side, the cement hopper discharging down through the aggregate hoppers?      A. Yes, sir.

Q. At the time you went to work for Consolidated in December, 1948, what were Merle Stromberg's responsibilities?

A. He was in charge of a maintenance crew.

Q. Maintenance, doing what? [346]

A. Repairing the batching plants and anything to do with them, bunkers and anything that had to do with the batching plants.

Q. The batching plants of Consolidated?

A. That's right.

Q. Now, is it a fact, Mr. Pinne, that you have operated batching plants, you have watched batch-



(Testimony of Douglas E. Pinne.)

ing plants in operation, and you have inspected batching plants? Will you please answer that?

A. I did not understand.

Mr. Sellers: Please read the question, Mr. Reporter.

(Question read.)

The Witness: Yes, sir.

Q. (By Mr. Sellers): Is it a fact that in your position as manager for Consolidated, you have the authority to purchase batching plants?

A. Yes, sir.

Q. And you also have the authority to move them from place to place, if that be necessary?

A. Yes.

Q. Have you in your experience had occasion to observe the operation of batching plants of the side feed type? A. Yes, sir.

Q. Would you please describe what you have observed in the operations of the plants of the side feed type as [347] distinguished from the central feed, which is the type we see illustrated in Exhibit 14? I think you are familiar with it. The cement feeds into a central hopper down through the aggregate, which comes from hoppers on the two sides? A. Yes; that's right.

Q. Will you describe what you have seen in your observation of the side feed plants?

A. We have a problem of applying the cement, may I say, to the aggregate in a satisfactory man-

(Testimony of Douglas E. Pinne.)

ner in the gathering hopper when it feeds in from the side.

Q. Would you please explain what that problem is?

A. The cement is not falling vertical and, consequently, when it is turned on with the aggregate, it has a tendency to spill or fluff up, as it were.

Q. Mr. Pinne, I wonder if you would step down from the stand and on the blackboard draw a diagram for the benefit of the court of the relationship you have in mind.

Mr. Lyon: Before he does that, may I have the answer to the last question?

Mr. Sellers: Will you please read it?

(Answer read.)

Q. (By Mr. Sellers): Would you like to draw on the blackboard, please, Mr. Pinne, if his Honor is willing, a showing of the relationship you have just described?

A. I am not a very good artist, but assuming that this [348] is an aggregate weigh box here and, of course, underneath the aggregate weigh box is a gathering hopper, under which the truck is placed to receive the material.

When you have a cement weigh box on the side, of course, your problem is getting in here. If you discharge that cement here while this aggregate is going down, this cement has a tendency to boil out the top of this against this dam of material here.

So to overcome that, you try and run a pipe down

(Testimony of Douglas E. Pinne.)

into this, and then the moisture accumulated around this actual pipe in here, to get away from this boiling action, becomes damp and the cement cakes on that and consequently you have got a restriction there.

Also, our plants are used, and everyone's plant is, practically, for not only ready-mix concrete, but dry batching. Dry batching is merely a dump truck with gates in the middle, and you put the aggregate and the sand and cement in there, and it is hauled, in our case to these freeways around here, and each batch is dumped onto the skip of the mixer on the grade.

In this type of operation, we change this gathering hopper here because of the fact that the dump truck is square, and if you dump it all in a pile in the center, it will run over the top of the batch truck, so you have to spread the material out, and as this cement comes down in this type weigh [349] box, it has a tendency to shoot clear over and get on one side and stick in the truck and blow away and all of that, rather than to ribbon in or to go in properly and get mixed with the sand and gravel. That is from the dry batch angle.

We have, of course, as I said, the problem of it boiling out here, rather than going into the aggregate properly on a ready-mix truck.

Mr. Sellers: If I may add, your Honor, he referred to a dump truck, which is a different type conveying truck than the ready-mix truck that we have been hearing about the last few days. The

(Testimony of Douglas E. Pinne.)

ready-mix truck receives the aggregate and is the type you have the rotating bin, whereas the dump truck——

Q. Well, will you explain that?

A. The dump truck, of course, as I said, has compartments in it with gates which trip one at a time on the cement mixer or on the grade for our freeways or any kind of a paving job where they have a mixer, and the water, the proper amount of water is added in the mixer on the job. It is hauled to the job in a dry form and the contractor is very desirous of getting that cement mixed into the aggregate and sand suspended within it, rather than on the bottom or top where it would stick to the bottom of the truck with the dampness of the material, or blow away were it on top of the truck.

Q. Let me ask you, Mr. Pinne, with the cement coming [350] down from the side as in the diagram you have drawn, would it not be a fact that much of that cement would be prevented from getting into the discharge by means of the shaft of aggregate and would go around and go up and out on all sides of the collector hopper?

A. That's right.

Q. And in the dry mix condition, that would be particularly important, wouldn't it, because you would have both dry aggregate and dry cement, substantially dry aggregate?

A. That's right.

Q. Have you, in standing and watching the operation of a side feed plant of this type—well, what can you tell us about what you have observed about the creation of clouds of cement or dust?

(Testimony of Douglas E. Pinne.)

Mr. Lyon: Your Honor, may I interpose an objection at this point that this is one particular type of plant, and there is no showing that this is the only type of side entry plant that was ever around, so I don't see the pertinency of the difficulty he has with this particular type.

We have had the other witnesses testify there were a number of these types available. I have been rather patient, but I don't see the purpose of it. It seems to me to be immaterial.

The Court: Overruled. You may answer.

Mr. Sellers: Will you read the question, [351] please?

(Question read.)

The Witness: Our problem with this type of plant is applying cement properly with the aggregate so that when it gets in this ready-mix truck, it will not go through there first and get into the ready-mix truck ahead of the aggregate, because when cement does, with the water that is already in there, we encounter trouble with the cement balling in the front of the mix.

The Court: You are still using that kind of batch plant, aren't you?

The Witness: Yes, sir.

The Court: In fact, from your testimony, about half of your batching plants are of that kind?

The Witness: Approximately that.

Q. (By Mr. Sellers): But do you run into the

(Testimony of Douglas E. Pinne.)

problem you have just described in these batching plants?

A. We are continuously overcoming one problem and another by changing and experimentation, and the fact that we have experienced batch operators there that are capable of controlling this valve in such a manner that we do not allow the cement to get in there ahead of the aggregate.

Q. Is it a fact that with this type of operation you find that you have greater cement clouds and dust clouds in the operation of the plant?

A. That today is our biggest problem, the air pollution. [352] We keep pretty busy keeping out of trouble with this type of plant as far as air pollution is concerned. That is our problem.

Q. Do I understand you to say with this type of plant you actually have an air pollution problem which is not present in the Johnson type plant?

A. Definitely.

Q. Thank you very much. Take the stand again, please. Now, you have stated you have less dust problem and air pollution problem with the center flow plant.

What, in your opinion, is the reason for that? Is it because in the central flow plant the cement is protected by the enclosing body or stream of aggregate, or what is the reason, in your opinion?

A. When the aggregate and the cement are dumped in simultaneously in this type of plant—

Q. Referring to Exhibit 14?

A. Yes. The flow being vertical and the mate-

(Testimony of Douglas E. Pinne.)

rial coming in from the two different sides tend to distribute that cement in a very uniform manner and, consequently, while it is allowed to flow out from that—the aggregate coming from both sides, you naturally don't have the restriction there that you do coming in from the sides of the aggregate.

Q. You mean the restriction of the cement?

A. That's right. [353]

Q. Do you have as a result less formation of air pollutants in this type of plant?

A. Definitely.

Q. That statement is based upon your personal observation of the plants under your control?

A. That's right.

Q. You have mentioned in a type of the side feed plant that you have, with the cement coming in from the side, if you extend the cement duct down far enough to get it into the stream of aggregate, you have a moisture problem present. Is that problem present to the same degree in the type of plant of Johnson, the Johnson type?

A. No, it is not, because the bottom of the cement weigh box in this type on this 14 does not actually reach down into the aggregate.

Q. You have also mentioned balling up. Is it not a fact that today—well, let's put it this way. What do you mean by balling up, Mr. Pinne?

A. The fact that there is aggregate underneath this before this gate is tripped retards the flow of that cement just enough until the aggregate gets started so that the cement does not get in the mixer

(Testimony of Douglas E. Pinne.)

first. It gets in there with the aggregate and keeps it from collecting in balls in any way, whereas with that type where the pipe is down below and those are turned on simultaneously, the cement gets a head start on [354] the aggregate and gets in there first, and there is always rinse water in a drum of a mixer, 10 or 15 gallons, whatever is required, and as that cement hits that water, it immediately becomes a ball, and it will stay that way until it is discharged from the mixer.

Q. Is that statement based upon your personal observation?      A. It is.

Q. I believe you have pointed out to the court that in the filling of the dump trucks there is danger with the side feed type of cement that the cement will all go to one side of the dump truck, rather than to be intimately mixed as is desired.

A. That's right.

Q. That is something that occurs with regularity so that you have to be worried about it, is it?

A. It is just a case that we try to not run any dry batch trucks out of a plant with a side weigh box on it.

Q. However, are you perfectly free to run dry mixtures out of a plant of the Johnson type?

A. We are doing it presently, dry batch.

Q. Is it not also a fact that because of a development in the field of mixer trucks the mixing which takes place in the Johnson plant is particularly desirable, even more than it was years ago, and by that I mean has there not been a change [355] in



(Testimony of Douglas E. Pinne.)

mixer trucks from a top opening type to an end feeding type?

A. Formerly we had a hatch on the side of our drum and the drum was stationary while it was being charged. Consequently the cement and aggregate just automatically got mixed as it was dumped, as it were, in the inside of the mixer that was stationary, so it went into a pile down there and was naturally mixed right inside there, or blended together, may I say, before there was ever any mixing action from the mixer, but those are a thing of the past, and today we apply the sand and aggregate and cement to the rear of the mixer, and it is wound in, as we commonly call it, with the mixer rotating.

Consequently, it is very desirous—this is not my opinion, it is everyone's opinion—it is very desirous to get the equal amount of sand and cement and aggregate starting into that mixer from the minute the gate is open.

Mr. Lyon: Your Honor, may I suggest or move that we strike the portion of the answer which was not based upon his knowledge.

The Court: Denied.

Q. (By Mr. Sellers): Can you make any statement from your experience concerning the time required to effect satisfactory mixing of concrete from a Johnson type plant as compared to concrete from a side feeding type or some other type?

A. Mixing time has a great deal to do with the type of [356] a mix that is charged into the mixer. It is my belief this type of—this detail 14 here will

(Testimony of Douglas E. Pinne.)

properly mix the concrete in a shorter time than a different type of weigh batcher.

Q. Did I understand you to mean that the concrete from this type of plant could be processed more quickly in the mixing truck than concrete from another type of plant?

A. We are required to mix it a certain number of revolutions.

Q. I understand that in the City of Los Angeles we have city time requirements, that the law requires that we have the mixing take place for a certain range of time in the truck, is that correct?

A. That's right.

Q. Do those limitations of time, however, have any application for jobs other than city jobs?

A. We feel that——

The Court: That is not the question, what you feel or "we feel."

The Witness: May I have the question?

The Court: Read the question.

Mr. Sellers: Will you read it, Mr. Reporter?

(Question read.)

The witness: They have approximately the same limitations.

Q. (By Mr. Sellers): You mean for jobs other than city [357] jobs?      A. That's right.

Q. How about jobs outside the County of Los Angeles? Are the city time requirements applicable there?

(Testimony of Douglas E. Pinne.)

A. There must be a certain length of time to properly mix that concrete.

Q. But is that required by law, that is what I meant?      A. No, it is not.

Q. Then let me reword my first question, because I am afraid I did not make it clear. The City of Los Angeles has certain requirements by law, I understand, for certain city work, but how extensive is the application of those requirements?

Do you have jobs in which those time requirements are not applicable?      A. Yes.

Q. I am sorry I confused you. Please explain that.

A. There is certain grades of concrete that are poured that don't need the strength that some types of jobs do. Consequently, if your job is close to the mixing plant and you can do a good job of applying the cement and aggregate into the mixer, you are able then to discharge it immediately on arrival at the job, rather than standing there and mixing it after you arrive on the job.

Q. Is it a fact that it has been your experience that [358] you can mix in less time where the concrete mix is of the Johnson plant type?

A. I can't answer that in the affirmative, because we don't have any job close enough that I have found any difference.

Q. Would it be your experience, however, that such would be the case?

The Court: When he says he doesn't know, how can he answer?

(Testimony of Douglas E. Pinne.)

Mr. Sellers: I wonder if the witness understood the question. Will you please read the question to the witness, Mr. Reporter?

The Court: Read the previous question.

Mr. Sellers: Yes, the preceding question, too.

(Record read.)

Q. (By Mr. Sellers): Did you understand the first question?

A. Yes. It is only natural if the cement and aggregate is applied in the proper manner in the mixer, you can mix it in less time to the proper consistency.

Q. That is the answer you intended to give to the first question?      A. That's right.

Q. Now, I think we have confused the court a little bit, and also me. [359]

The Court: You haven't confused me. Go ahead. Don't worry about me. I am keeping up with you.

Mr. Sellers: Your Honor, believe me, I am only worried about you.

Q. Has it been your experience that where the mix truck is charged from a plant other than the Johnson type plant, that frequently when the mixture is delivered to the job, it may be necessary to be very careful that there is a complete mixture taking place?

A. I would not say frequently.

Q. It doesn't happen very often?      A. No.

The Court: Not in your plant?

The Witness: No, sir.

(Testimony of Douglas E. Pinne.)

Q. (By Mr. Sellers): It is a fact, then, I take it—well, cancel that.

The Court: In all this operation there is a human element, isn't there?

The Witness: Yes, sir.

The Court: If you have good employees, you get good results. If you have poor employees, you get a poor result?

The Witness: Yes, that is for sure, yes, sir.

Mr. Sellers: Your Honor, I wonder if I might read into evidence a part of this book.

The Court: Well, now, we have got this witness on the [360] stand and I would like to get this witness off the stand by noon, if I could. Do you want to read the book so he can listen to it?

Mr. Sellers: I don't think so. That wasn't my purpose, honestly.

The Court: If you have got any other questions, let's proceed with the examination.

Mr. Sellers: My purpose was I hoped we might have him on the stand at the recess so that I could call him again after lunch and conclude at that time.

The Court: I am trying to get rid of the witness. Do you want to keep him until after lunch?

Mr. Sellers: Your honor, Mr. Denny here is my co-counsel from back in Wisconsin and I wonder if I might let him ask certain questions in this particular case.

The Court: As a general rule, only one counsel can inquire of a witness.

Mr. Sellers: I understand that, your Honor, but

(Testimony of Douglas E. Pinne.)

in this particular case we only came in contact with the witness just last night about 10:30, and we have not had adequate time, you might say, to prepare, and I wonder if co-counsel would object?

Mr. Lyon: Whatever is the court's desire.

The Court: Well, I object. I want to finish this case tomorrow. [361]

Mr. Sellers: So do we.

The Court: We have been going for several days now.

Q. (By Mr. Sellers): In connection with the operation of the plant, Mr. Pinne, does an increase in height increase operating costs?

A. Just initial costs.

Q. Just initial costs? A. Yes.

Q. The subsequent costs are not materially increased? A. That's right.

Q. Turning now to the operation of the discharge here, it has been testified that the aggregate upon dropping out of the aggregate hopper has a very slight drop, rather, a very slight arc.

Do you have an opinion based upon your experience as to the path of flow of the aggregates coming down the side walls of the aggregate hopper, and on their way down to the collecting hopper?

Mr. Lyon: I will object to that, your Honor.

The Court: Sustained. There is no foundation for that sort of an opinion from this witness.

Q. (By Mr. Sellers): Have you observed, Mr. Pinne—

The Court: Now, you are just trying to kill time

(Testimony of Douglas E. Pinne.)

so you can keep the witness on the stand, and if that is so, we will take our recess. [362]

Mr. Sellers: Well, your Honor, I certainly do not want you to think that we are wasting time. However, I would like to have him here at 2:00 o'clock.

The Court: Even though I felt you are wasting time, I wouldn't criticize you particularly for it, because it is something all lawyers do.

Mr. Sellers: Then I feel better.

The Court: If you want to keep control of the witness——

Mr. Sellers: I would appreciate the recess now, your Honor.

The Court: All right.

Mr. Sellers: Thank you very much.

The Court: We will now stand in recess until 2:00 o'clock this afternoon.

Mr. Sellers: Thank you.

(Thereupon, a recess was taken to 2:00 o'clock p.m.) [363]

Thursday, March 15, 1956—2:00 P.M.

The Clerk: C. S. Johnson vs. Merle W. Stromberg, et al., further trial.

The Court: Are you ready?

Mr. Lyon: Yes, your Honor.

Mr. Sellers: Just one or two more questions, your Honor.

## DOUGLAS E. PINNE

the witness on the stand at the time of the recess, having been heretofore duly sworn, was examined and testified as follows:

## Direct Examination

(Continued)

By Mr. Sellers:

Q. Mr. Pinne, approximately how many tons of aggregate and cement are there in a cubic yard of concrete?

A. Just a little less than two tons.

Q. And approximately how many tons of concrete does your company batch in an ordinary working day?

A. Ordinarily about 7,000 yards.

Q. Would it be correct to say that your company each working day lifts approximately 14,000 tons of aggregate and cement into storage bins of its concrete batching plants?

A. Approximately.

Q. You stated that you still have side feed plants in [364] operation in your company today, is that correct?

A. Yes, sir.

Q. About how long does a plant last?

A. With the proper care—Will you ask that question again, please?

Q. Yes. About how long does a batching plant last? Does it have a short life or a relatively long life?

A. A relatively long life.

Q. About how long? A. 20 years.



(Testimony of Douglas E. Pinne.)

Q. Thank you. Were those side feed plants which you have today in your company and which are still operated plants which were purchased quite some time ago?      A. Some of them.

The Court: May I ask a question?

Mr. Sellers: Certainly, your Honor.

The Court: Of these plants in 1948 that were operating and where the cement container was in the center, were those of recent construction or old construction?

The Witness: What year?

The Court: In 1948.

The Witness: In 1948, they were of recent construction, sir.

The Court: Had they been constructed in the previous two or three years? [365]

The Witness: That's right, yes, sir.

Q. (By Mr. Sellers): You have the power today to purchase plants for your company, I believe you said.      A. Yes, sir.

Q. And if you were purchasing a plant today, would you purchase a side feed plant or a central feed plant?

Mr. Lyon: I will object to that, your Honor. That is just speculation.

The Court: Overruled. All other things being equal, prices being equal.

Mr. Sellers: All right, prices being equal. Thank you, your Honor.

The Witness: The center feed plant.

(Testimony of Douglas E. Pinne.)

Mr. Sellers: Thank you. Your witness, Mr. Lyon.

Cross-Examination

By Mr. Lyon:

Q. How many different types of batching plants do you have under your control, sir?

A. How many different types?

Q. Makes.

A. Makes? I will have to trust to memory on that, if you don't mind, by the telephone directory. Approximately six.

Q. Do you have any idea how many different types of [366] plants are available on the market at the present time? A. No.

Q. Have you ever used a Noble plant in your operation? A. Yes, sir.

Q. Was the plant you referred to in 1940 which is, I believe you said, one that fed the cement from the center into the aggregate, was that a Noble plant? A. What plant was that?

Q. The plant you referred to on direct examination which was available in 1940. A. Yes.

Q. That was a Noble plant? A. Yes.

Q. When did you first acquire a C. S. Johnson plant of the type in suit?

The Court: You mean Johnson or Johnson type?

Mr. Lyon: Let me rephrase the question.

Q. Showing you now the patent in suit, how many plants of this type made by the C. S. Johnson Company do you have at the present time?

(Testimony of Douglas E. Pinne.)

A. Four.

Q. Four. How many plants do you have total at the present time? A. 23.

Q. When you testified that you felt that you received [367] certain advantages from the type of plant where the cement was discharged centrally of the aggregate as it flowed into your mixer, did you have only this particular Johnson plant in mind, or do you have other plants which will accomplish that result? A. Are you asking me——

Mr. Lyon: Would you read the question again, please?

The Court: Read the question.

(Question read.)

The Witness: I will have to answer that question in two parts.

Q. (By Mr. Lyon): Go ahead.

A. I feel that the Johnson plant had its advantages, and I also had in mind the other type plant.

Q. The Noble type plant?

A. That's right.

Q. What is the difference between the Noble type plant and the Johnson type plant?

A. They are completely different except for the position of the cement.

Q. The position of the cement in the aggregate hopper is identical, is it not?

A. The position is identical.

Q. The only difference, then, between the Noble type plant and the Johnson type plant lies in [368]

(Testimony of Douglas E. Pinne.)

what? A. In the separate weigh batcher.

Q. In other words, the difference is that in the Johnson plant both the aggregate and the cement hoppers are suspended from their own independent scales, while in the Noble type plant a single scale supports both of those?

A. And positioned differently.

Q. How are they positioned differently, sir?

A. Due to the type of weigh box they have to be positioned differently.

Q. I don't understand what you mean by positioned differently. You mean the hoppers inside of each other are different? A. Yes, sir.

Q. How are they different?

A. The cement weigh box in a Noble plant is lower than the cement weigh box in a Johnson plant.

Q. So that the discharge of the cement hopper and the discharge of the aggregate hopper are closer together, is that correct?

A. That's right.

Q. What is the distance between the two?

Mr. Sellers: May I interrupt to ask if your purpose is to establish the anticipation, Mr. Lyon, or merely to establish that the witness knew about this other type of plant and could have [369] purchased it?

There is no evidence whatever that the Noble type plant has a date sufficiently early to be an anticipation.

Mr. Lyon: What I am trying to prove, your

(Testimony of Douglas E. Pinne.)

Honor, is that this man's testimony is not related to this patent in suit, but related to a general type of plant, not this specific plant.

The Court: There is no objection. Go ahead.

Q. (By Mr. Lyon): Now, would you answer the question?

A. May I have the question again?

Mr. Lyon: Will you please read it?

(Question read.)

Q. (By Mr. Lyon): Speaking of the discharges in the Noble type of plant.

Mr. Sellers: I think I will object to that, your Honor.

The Court: Overruled.

The Witness: I cannot answer that in any specific answer. I do know that the Noble plant weigh box hangs much lower than the Johnson weigh box.

Q. Do you get any different result insofar as inter-mixing, pre-shrinkage, or avoidance of balling up between the Johnson plant and the Noble plant?

A. Yes.

Q. What is that difference?

A. The difference is in the fact that the cement is closer to the discharge point.

Q. So, in other words, in order to avoid the difficulties [370] that you were discussing that you got out of this side entry type, the critical thing there is to get those two discharges in the appropriate relationship with one another?

A. That's right.

(Testimony of Douglas E. Pinne.)

Q. If your plant does not have the discharges related within a given range, then you don't get these results, is that correct?

A. That's right.

Q. Now, in the operation of a batching plant, the operator can, if he so desires, put all of the aggregate into your mix truck first and then add all the cement, is that correct? Any type of plant?

A. I don't follow you.

Q. Let's say we have got a bin with cement in it and a bin with aggregate in it. If the operator desires, he can open the discharge for the aggregate and dump all of that into the mixer without touching the cement? A. Not every plant.

Q. Not every plant? A. No.

Q. What type plant can't do that?

A. Any plant that is interlocked, it is not possible.

Q. It is practice to interlock these plants?

A. positively.

Q. So the contractor would designate that he wanted the [371] hoppers interlocked. I believe your answer was that the State of California requires that. A. Right.

Q. If the mixer truck is overloaded by the operator of the batching apparatus, what is the result?

A. What is the result?

Q. Yes.

A. Dump the load and bring it back and give the proper load.

Q. What is the result on the concrete mixed?

(Testimony of Douglas E. Pinne.)

It is no good?      A. That's right.

Q. So that if the operator happened to put an extra half yard or extra yard of cement into the mixer, the material is substantially wasted?

A. That's right.

Q. When you get complaints, as you undoubtedly do, from contractors, do you find that that is one of the causes of the complaints that your concrete was not adequately mixed?

A. In the past we have. We have tried to correct that in recent years.

Q. That, however, is a problem under the control of the truck mixer or of the batching operator?

A. Under the control of the batch operator, and the plant itself. [372]

Q. Referring to this little diagram you have sketched on the blackboard, is that the only kind of side operated plant you have ever had?

A. The only kind?

Q. Yes.      A. The only type.

Q. That you have had any association with?

A. Yes.

Q. Have you ever had any association with a plant wherein the discharge from the cement hopper pierces the aggregate hopper and spills down the inside?      A. Yes.

Q. Is that what you would call one of the centrally discharged or concentric discharge plants?

A. I wouldn't call it that, no.

Q. Do you obtain any different mixing with one that operates in that way?

(Testimony of Douglas E. Pinne.)

A. A better mix than the other kind.

Q. A better mix than this kind? A. Yes.

Q. How does it compare with the type of plant we are talking about in the Johnson patent?

A. It comes as close to comparing with this type, if you are able to get your discharge in the proper position down here in that type. [373]

Q. It would get the identical result, would it?

A. I wouldn't say that, no.

Q. Well, if you get your discharge in the proper point, you will get as closely as possible a pre-mix, a pre-shrinkage?

A. No. It is an entirely different type discharge then, so you have force behind it. You are screwing it out there rather than dropping it of its own free will.

Q. You testified that in the operation of the Johnson type plant you had less of a dust problem than you do with this side operated plant, is that correct? A. That's right.

Q. In the Noble type plant, do you have the same curing of the dust problem that you have in the Johnson plant?

A. We have a little more dust problem in the Noble plant.

Q. In all of these plants you do have dust, do you not? A. A slight amount.

Mr. Lyon: I think that's all. Your witness, Mr. Sellers.

Mr. Sellers: Just one question.



(Testimony of Douglas E. Pinne.)

Redirect Examination

By Mr. Sellers:

Q. I believe it was stated on cross-examination that in [374] the side feed type of plant, Mr. Pinne, that you might improve its operation if you extended the feed for the cement way down to the bottom here in an extended line so that it almost approximated the line of passage of the aggregate?

A. That is what we attempted to do.

Q. If you do though, is it a fact or is it not a fact that you tend to have difficulty with the moisture through clogging?

A. That's right.

Mr. Sellers: That's all.

The Court: May this witness be excused?

Mr. Sellers: Yes.

The Court: He may be excused.

Mr. Sellers: May he leave, your Honor?

The Court: Yes. He is excused.

Mr. Sellers: Thank you.

(Witness excused.)

Mr. Sellers: I believe, your Honor, that in just a minute we will rest our prima facie.

We do rest, your Honor, the prima facie case.

The Court: Call your first witness.

Mr. Lyon: Mr Wisniski, will you take the stand, please? [375]

## WILLIAM H. WISNISKI

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: You may be seated, and state your name.

The Witness: William H. Wisniski.

The Clerk: Will you spell it, please?

The Witness: W-i-s-n-i-s-k-i.

## Direct Examination

By Mr. Lyon:

Q. What is your present occupation, Mr. Wisniski?

A. Engineer for the W. E. Kier Construction Company.

Q. That is a Los Angeles concern?

A. Yes, sir, El Segundo.

Q. Would you state your education, Mr. Wisniski?

A. I have a B.S. in chemical engineering from Washington State College.

Q. When did you receive that degree, sir?

A. 1935.

Q. Upon graduation from Washington State College, where did you go to work?

A. I went to the work for the Bureau of Reclamation at Coulee Dam, Washington.

Q. That is the federal government, Department of Commerce? [376]

(Testimony of William H. Wisniski.)

A. Federal government, Department of the Interior.

Q. Department of the Interior, Bureau of Reclamation?  
A. Yes.

Q. That was at the Grand Coulee Dam?

A. Yes, sir.

Q. What was your job there?

A. Initially I worked as a civil engineer on surveys for a small period and the rest of the time was as a concrete engineer.

Q. What are the duties of a concrete engineer, sir?

A. The concrete engineer at Coulee Dam, the concrete control department, in which I worked, had the responsibility of inspection of all the concrete that went into Grand Coulee Dam and the design of this concrete, the inspection of all the ingredients that went into the concrete, and, oh, also field work in aggregate investigations.

Q. Did you have any connection with the mechanical devices by which the concrete was mixed and prepared?

A. Yes. I spent considerable periods in the actual plants at Grand Coulee Dam during that period and also in the laboratory.

Q. In the laboratory work you would determine what kind of a mix you desired for a specific job on the dam?

A. Yes, sir. We had numerous different mixes that went [377] into the dam proper. We had to design it for maximum economy and strength, quality

(Testimony of William H. Wisniski.)

in all respects, and we had considerable work in, oh, in concrete control you try to maintain the quality and uniformity of the concrete through various tests at all times. It is checked continuously.

Q. Do I understand it correctly, then, that in building a dam or a structure of that size, you use one different type of mix of concrete under some situations and a different type in a different situation?

A. That's right. In a dam they use a lot of what you call mass concrete or concrete that goes in the bulk of the structure where it is not restricted by reinforcing steel or small forms, and in that place we use what you call six-inch maximum aggregate or cobbles, and that went into six through on its smallest dimensions, and at places where you had reinforcing steel or forms of restricted nature, you used the smaller size rock, all the way down to  $\frac{3}{4}$  inch maximum.

In some, oh, minor cases, where it might go down to  $\frac{3}{8}$  inch maximum, and then you go down to grout or sand and cement and water mixture alone.

Q. During your stay at the Grand Coulee Dam, what type of batching apparatus was used to prepare the concrete?

A. It was the Johnson—they had two Johnson plants for the bulk of the construction. They are large plants of, oh, the last plant was a dual 4-4 yard mixer plants together. [378]

Q. The design of those plants is different from

(Testimony of William H. Wisniski.)

the design of the patent in suit here which I will show you in just a moment, is that correct?

A. It is much different. The big plants have a separate batcher for each ingredient. For each size of gravel, for instance, there is a separate batcher. At Grand Coulee, for instance, as in the case of many of the larger dams, we had one size of gravel, 3 to 6 inch, that was the larger size, and another batcher for 3 inch to inch and a half, and another batcher for inch and a half to  $\frac{3}{4}$ , one for sand, one for cement, and then a water batcher.

Q. How long were you with the Federal Bureau of Reclamation on this Grand Coulee?

A. I worked there from July, 1935, until October, 1941, at which time I went into the armed forces during the war.

Q. What was your job in the armed forces during the war?

A. I had a number of positions. The final and the highest position I had was commander of an engineer combat battalion.

Q. During which time you handled some of the cement construction work that the Army was doing?

A. Yes. We had all miscellaneous field construction during the war in this country and overseas.

Q. After you left the service, where did you go? [379]

A. I went back to Grand Coulee Dam for a short time, about three months, and then into the——

Q. You were again with the Federal Bureau of Reclamation?

(Testimony of William H. Wisniski.)

A. Yes, back to the Federal Bureau of Reclamation. I was just on leave during the war.

Q. After you left Grand Coulee Dam, what was your next work?

A. I was still with the Bureau of Reclamation. I went into the Columbia Basin, which is adjacent to or a part of this Coulee Dam or Columbia Basin Project, the irrigation end of it. I spent a year at Pasco, Washington, on the construction of a pumping plant in the lateral system for that project there, and then I spent a year at Ephrata, Washington. That is the headquarters of the Columbia Basin Project.

Q. For the Federal Bureau of Reclamation?

A. For the Federal Bureau of Reclamation.

Q. During those two years, I think that is 1947 and 1948, did you have contact with batching equipment?

A. Yes, considerable experience at Pasco, and on this one project itself we had two different contractors with separate batching plants. I was concrete engineer on that project, and we supervised, controlled the concrete for that entire subdivision.

At Ephrata, I was the assistant concrete engineer [380] for the whole area which comprised, oh, the Columbia Basin Project itself involved the irrigation of over a million acres of land, so it extends for about 150 miles north and south, and there was numerous contracts going on in this area. There were dams under construction, tunnels, siphons, pumping plants.

(Testimony of William H. Wisniski.)

Q. In all of this work you were closely associated with cement batching and the batching apparatus, is that correct?      A. Yes, sir.

Q. Was it your job to supervise this equipment and suggest when they were being improperly used?

A. Not so much the actual supervision as it was the inspection. On all the government work before a contractor begins operations, he must have approval of his equipment before he can operate it and produce concrete for a certain government job. One of my duties in all of this work was to check over the plants and approve or disapprove them, and show them where they could be improved and make them conform to our minimum requirements, and during the actual operation of this equipment, if there was anything faulty in the manner in which they worked, we forced them to change it so they would get desirable results.

Q. So you were constantly analyzing the output of the batching equipment?

A. Yes, in every manner. I constantly, either myself [381] or supervised test work or the observations necessary to get the specification concrete.

Q. Observing these plants actually in operation?

A. Yes, sir.

Q. To see that they were being run correctly?

A. Yes.

Q. After you left this post with the federal bureau, where did you go next?

A. I was still with the Bureau of Reclamation. I went to Canyon Ferry Dam in Montana. I was con-

(Testimony of William H. Wisniski.)

crete engineer on this dam. It is a dam on the Missouri River near Helena, Montana. I spent approximately five years on this project as concrete engineer.

Q. During that time your duties were similar to those you have outlined?

A. Similar to what I have mentioned. I was concrete control engineer, had charge of concrete control section which had full authority over the inspection and control of the concrete for the dam.

Q. Now, in August, 1953, you left the Bureau of Reclamation, is that correct?

A. I left the Bureau of Reclamation in August, 1953, and went to work for a joint venture of Kier Construction Company, who I am now with, and Daniel, Mann, Johnson & Mendenhall, architects and engineers of Los Angeles, who had a [382] contract with the Indian government for consulting and preparing the master construction plan for Rihand Dam.

Q. Did this particular job require you to leave the country?

A. Yes. We spent approximately eight months in India.

Q. Teaching the Indians how to make one of these dams, is that correct?

A. Yes, sir. Our job involved preparing the master construction plan, which was the design of the entire construction scheme for the building of this dam, the design of the major equipment, layout of numerous items, such as plants, cable ways,



(Testimony of William H. Wisniski.)

bridges, town sites, roads, everything imaginable, including health and sanitation, so it was quite complete and we were available at all times to the Indian government engineers on a consulting basis, and I was consulted, or they consulted us on very many items.

Q. Would they also consult you regarding concrete problems?

A. Yes. That was one of my big jobs, by no means all of it, but I had full responsibility for answering all questions on concrete and the concrete plant in general, the placement and manufacture, both.

Q. Now, upon your return from India, what was your next occupation?

A. I went to work for the Colorado Pre-Mix Concrete [383] Company, Denver, Colorado, with the main responsibility of promoting, developing and installing moisture meters that test the moisture content of concrete aggregates.

Q. Would those meters be placed on a batching plant?

A. Yes. They are designed largely for use in the sand batcher, electrodes actually installed in the sand batcher, and also can be installed in a gravel, especially the finer gravel batcher, and they are used to determine the moisture content of particularly the sand.

Q. What did you do with the information after you determined what moisture was in the sand? I mean what does that control?

(Testimony of William H. Wisniski.)

A. The moisture in the sand is a very critical item in concrete manufacture, because it varies so much. There are some sands will hold 12 or more per cent moisture, and that same sand can dry out to maybe 2 per cent or thereabouts, any percentage in between, and you take 10 per cent, say it is 10 per cent sand moisture of a batch of sand, say it is 1,000 pounds of sand, that is 100 pounds of water, and the water that is in the sand will greatly influence the consistency of the concrete or how fluid it is, and thereby, also, influence the critical item of water-cement ratio or the ratio of the water in relation to the cement, which has great bearing on the strength and durability of the same concrete.

Q. So that these materials would indicate the amount of [384] water present in the aggregate and from that you would deduce that you needed less water or more water in the batch as it was discharged?

A. Well, if you visualize a typical situation, the operator is batching material and he sees the sand moisture content jump from, say, 5 per cent to 10 per cent, and say he has got a thousand pound batch of sand, so he knows there is 50 pounds more water being introduced into this batch by the moisture in the sand, and so from his added water he has to cut 50 pounds of water and has to add a corresponding amount of sand.

Q. The most critical factor, then, in batching concrete correctly is to control the amount of water

(Testimony of William H. Wisniski.)

that is put in with respect to the amount of sand, is that correct?

A. That is very critical. That water-cement ratio is generally a specified figure, and any time that you exceed your specified figure, your concrete strength is reduced accordingly.

Q. And the apparatus by which the cement is mixed or batched has no bearing on that whatsoever. If the waterer doesn't get the water-cement ratio correct, he is not going to get a correct batch?

A. It is generally to do with what you actually put in the batch. You can't mix it out in any manner if you introduce your ingredients in the wrong proportions. If you add [385] too much water, you have got it in there and you have to mix it up.

Q. At this time did you have under your supervision or control or observation any of the plants of the type illustrated in Johnson patent No. 2,138,172?

A. Yes. During this time I toured the United States. I made installations in plants all over the United States and I observed many more plants. One part of my duties in this job in connection with my work was to try to promote concrete quality and to more or less operate as a consultant with everybody that we possibly could deal with in trying to promote our product, and before we could really promote our moisture meter, we many times had to teach the basic fundamentals of concrete manufacture and control to many people.

The concrete industry in general in the United

(Testimony of William H. Wisniski.)

States is not in too good a state as far as quality of concrete is concerned.

Q. After you left this job, what was your next occupation?

A. I went to work as an engineer for the Kansas City Quarries Company in Kansas City, Missouri.

Q. What were your duties there?

A. I was general manager for the plant. Their main business was concrete, transit-mix concrete, and they also had precasting operations and did their own plant construction [386] and had their own quarries and so forth.

Q. When you mention transit-mix concrete business, by that do you mean that they would have a batching apparatus and people would come in and would have mixers, and you would take the cement out and sell it to them at a particular job?

A. They had two types. They had what we call dry and wet plants. They had a couple of premix plants where they would batch the concrete and actually mix it up and deliver from the mixer into a transit mixer, more or less as an agitator in this case. It would transport it to the job and deposit it where necessary.

They also had plants they called dry plants where the material is batched unmixed directly into the transit-mix trucks and the truck does all the mixing in that case, and conveying to the job.

Q. Did you use any of the Johnson type plants shown to you in that operation?

A. Yes, they had that plant.

(Testimony of William H. Wisniski.)

Q. After you left the Kansas City outfit, you came to your present occupation, is that correct?

A. Yes.

Q. What do your duties at the present time involve?

A. I am the general engineer for the W. E. Kier Construction Company. It involves a variety of work, all aspects of engineering. We have a lot—well, it will depend largely [387] on the job actually going on at the time. At present we have a dam at Blythe, California, on the Colorado River which we are just in the preparatory stages of construction on.

We have a job at Compton on storm sewers and a job at Santa Ana.

Q. Your primary occupation, however, is still dealing with concrete?

A. I have full responsibility of that item, plus other items like, oh, for the Blythe job I will be responsible for the selection of the proper plant to do the job. I will be responsible for the materials and the plants necessary to produce the aggregate, and also during the operations will be responsible that those plants are producing in the manner they are supposed to.

The Court: When did you say you started to work at the Grand Coulee Dam first?

The Witness: 1935, July, 1935.

Q. (By Mr. Lyon): When aggregate, sand and cement are placed in a mixing truck, what order

(Testimony of William H. Wisniski.)

must they be placed in to avoid balling up of the cement?

A. The big thing you strive for in putting concrete in a mixer, regardless of the type, is to try to, oh, avoid cement coming in contact, and the sand, also, for that matter, coming into contact with the bare metal of the mixer alone, because it is apt to, oh, maybe stick to the blades, especially [388] the back end or the end that is discharging into, and you try to distribute the time the ingredients go in so that there is no concentration of any one item at one end of the mixer or the other. For instance, you don't want all the sand in the back end of the mixer and all the gravel and cement in the other end of the mixer, and the water all at one end, and so forth. You time the entry of these ingredients so that they are more or less distributed through the mixer as evenly as possible.

Q. Now, it is possible to make satisfactory concrete, is it not, by putting first the rock from one hopper into the mixer and going on to the next and putting in sand and going on to the third and putting in cement, and so forth?

A. I might say that actually in the United States there is quite a variety of ways in which concrete people operate. I will say that I have had this experience in traveling the entire United States where I got quite a bird's eye view of what went on.

There is operations, for instance, where they actually do what you just described. They will have hoppers actually separated far enough that they

(Testimony of William H. Wisniski.)

will have to run a mixer along a string of hoppers and discharge each one of the ingredients separately, and particularly with cement, for instance, there is a number of towns, take our nation's capital, Washington, D. C., there it seems to be that the bulk of the [389] concrete is mixed in this manner.

Another place where the entire town seemed to be standard with it is Pittsburgh, Pennsylvania, where they feel they have got so far to go with their concrete that they will charge their sand and the rock from their batching plant into a mixer, and then into a dead mixer they will charge the cement dry on top of the sand and the gravel, and it is laying there in a layer. Then they will go out to their job, or shortly before they get there they will start mixing and add their water, so the cement is added entirely different, not together at all. It is just laying on top of the rest of the material.

Q. You do get a satisfactory concrete by that method?

A. Well, Washington, D. C., claims it has got good concrete and it has pretty good inspection in many cases.

In Pittsburgh, Pennsylvania, the state is fairly tight in its specifications.

Q. How do their specifications compare with the specifications, say of the City of Los Angeles?

A. Oh, I would say very similar. I haven't studied them all in too great detail. I can't really say.

Q. So that the only thing you have lost by doing

(Testimony of William H. Wisniski.)

it this way, I take it, then, is the time of running the mixer?

Mr. Sellers: I object to that as a very leading question, your Honor. [390]

The Court: Overruled.

Q. (By Mr. Lyon): Will you answer, please?

A. Well, with any mixer, very often, the mixing time is of consequence because the more that you turn your drum over, the more you wear that mixer out, for one thing, and the more energy you take to mix the concrete. In most cases in-transit mix, time itself isn't of too much essence, because the mixer has to travel to the job, and many times he may be traveling over a period of up to a half hour or so, and he has got plenty of time to mix that while he is traveling prior to the time he gets to the job, but you get a big job, like a dam, for instance, like the Grand Coulee, for instance, and the timing on these mixers was down to practically split seconds. They tried to squeeze every ounce of concrete they could out of the plant most times because they were the bottleneck in the concrete placement operation. They could take the concrete faster than the plant could put it out, so mixing time was of considerable essence at that time.

Q. Now, taking a second step from the individual stops of the hopper that puts the aggregate in the hopper, that puts the sand in the hopper, that puts the cement in the hopper, if you bring those three into sufficiently close relationship, stick the gathering hopper underneath, and funnel all of that



(Testimony of William H. Wisniski.)

in your mixer, do you obtain any different result than you would otherwise? [391]

A. Not measurable that I have been able to measure. I have worked with both plants, oh, like the Johnson plant, for instance, where you have individual batchers, generally in a circle around the gathering hopper, and they all come down to a common point and funnel into a mixer, in this type here in question, and in a number of other plants have made tests on mixer efficiency, and I could never measure any particular difference.

The big item that really made a difference was the way the charging was timed. That was of great consequence.

Q. But the mere physical location of the various ingredients with respect to one another as they go into a gathering hopper, does it perform any real difference?

A. Not that I could measure. There are other factors that may come in there like stuff hanging on the chute, for instance, or, like I mentioned before, of putting down cement in advance or late all by itself, and hanging up on the blades, or the back end of the mixer.

Q. You do, in your gathering hopper, when you put converging streams, get a mixing action, don't you?

A. I wouldn't say there was too much of a mixing action. I don't know exactly what you mean. You get a mixing action when you have got a——

(Testimony of William H. Wisniski.)

Q. You have got to have something moving sideways, don't you? Now, if you take this device shown in the Robb [392] patent, 1,750,244, there are the three hoppers, and there is a gathering hopper, and as those streams dump into that gathering hopper, you do get a mixing action, do you not?

A. Well, to a very minor extent, I would say. To get a mixing, you have got to have a folding and a refolding, and an actual churning of material. Just to bring material adjacent, to say that they were mixed—well, in this particular picture, you have got three streams of material. Well, you would visualize them coming down side by side with another one coming down the middle, and how much opportunity there is for the actual material to fold over itself, and how many times it would fold is, oh, I would say it is pretty hard to visualize what mixing action you get. It is very little. Maybe with two or three streams together, you get a possible interlinking right in the exact plane of contact, but I wouldn't say there was any general mixing in that.

Q. So that that mixing, whatever it is, that takes place is of no consequence in running your truck mixer, and so forth?

A. Not that I have been able to detect.

Q. Well, let's take these three hoppers in this Robb patent and bring them closer together so that the three streams will intersect as they discharge. Will you get any appreciable amount of mixing that will make any difference in the formation of concrete out of that action? [393]

(Testimony of William H. Wisniski.)

A. I can't see where that bringing them together would make any difference.

Q. Even if they do happen to hit each other or intersect, or what have you, on the way down?

A. There again you have got the same case I described before.

Q. Their mixing action there is no different than the mixing action that would take place in the gathering hopper if they were further apart?

A. No. They would meet at a common point. They have to meet there.

Q. And they have to reduce the circumference or diameter of the shaft and go down the smaller shaft, and you would have to get your mixing at that point?

A. They would have to have some way that they would fold and refold before you would get any real mixing in any case.

Q. I agree with you, that you can't take any of the so-called mix out at that point and have it concrete. It has got to be further mixed. My question is directed to whether this partial mixing, or what have you, that takes place at that point, is that of any consequence in the making of concrete?

A. About the only thing that you could probably accomplish there, that you try to accomplish, is to so co-ordinate the flow of that cement so that you wouldn't get your cement [394] falling on either the gathering hopper or into the mixer itself by itself.

Q. In other words, that disposition permits you to start your aggregate flow first, put your cement

(Testimony of William H. Wisniski.)

so it will flow on top of the aggregate constantly and keep it out of contact with the metal of your gathering hopper or of your mixing truck?

A. As long as you don't let the cement down alone.

Q. Too fast.

A. Too fast or too late. It would be the same condition.

The Court: Too late?

The Witness: You wouldn't want the cement to go in by itself after all the other ingredients.

The Court: But, however, how about putting the cement on top?

The Witness: Well, that situation that I described isn't the best practice. They do get some building up of cement on the blades, I think, more than you would if you partially fed that cement in with the rest of the ingredients.

The best mixer efficiency, I think, is to, I am sure, is to try to distribute your materials and time them so that they will go into the mixer together.

Q. (By Mr. Lyon): In other words, that will render the operation of the mixing truck more efficient, is that correct? [395] I mean if you put them in in the ideal sequence, you might avoid the building up of cement on your blades so that your mixer will do a more efficient job?

A. Yes, and probably with a better dispersion of materials, you probably wouldn't have to mix as long.

Q. In your experience with Johnson type plants,

(Testimony of William H. Wisniski.)

can you state whether or not there is any mixing of the concrete and the aggregate of an appreciable nature at the discharge of the aggregate hopper?

A. I wouldn't say that it is appreciable. If there is any mixing there, that is purely a hypothetical case. It would be very difficult to measure any mixing there. You can't see it to try to visualize it, what the situation is. You can't visualize any appreciable amount of mixing taking place there, because, as I described before, you don't get that folding or re-folding or actual churning of any material there to any great extent.

Q. So any discussion on any mixing at this point is pure speculation, in your opinion?

A. I would say it is.

Q. Do you know any way of testing that or finding out whether or not there is any mixing at that point?

A. One way you could test out this theory of whether there is any appreciable amount of mixing or shrinkage there is to set up two plants, one of this type and another of another [396] type, side by side, for instance, and have them charge, say a transit-mixer or a mixer—this same mixer, and with the same number of mixer revolutions, and then make mixer efficiency tests of both plants to see whether you had any improvement in your mixing condition.

Q. Do you believe that this operation I showed you here in this Robb patent would produce as much

(Testimony of William H. Wisniski.)

premixing or preshrinkage of this cement as this plant would, or can you tell?

A. Well, without running that elaborate experiment with two plants with the same mixer and same controlled mixing time, I wouldn't say.

I have had experience with both plants and made mixer efficiency tests of both plants and produced satisfactory concrete in those plants, various kinds of plants, and as far as I can see there is no appreciable difference in any of them.

Q. In other words, in the absence of tests establishing results one way or the other, you don't believe it is possible to ascertain from looking at those drawings whether or not there is any appreciable amount of pre-mixing taking place in either one of them?

A. I can't say by just looking at the prints that I could say there was any appreciable amount of pre-mixing.

Q. There would have to be an actual physical test made to establish that as a fact before you would be willing to accept [397] that?

A. That is correct. Take on actual specified mixing time in revolutions of mixers, and so forth, which many specifications specify, I don't recall ever seeing any place where they implied that the type of plant made any difference in the number of revolutions of a mixer that it took to produce what they termed as satisfactory concrete.

Q. In other words, the specifications as written up either by the government or by contractors al-

(Testimony of William H. Wisniski.)

ways call for the batch to be mixed a certain number of revolutions in the mixer before it was accepted?      A. Yes.

Q. Irrespective of the plant it came out of.

A. They would have certain restrictions on the plant. The scales had to weigh to certain tolerances, and the water had to be batched with tolerances, and probably in some certain manner that they specify.

The Court: Counsel, can I ask this witness a question?

Mr. Lyon: Certainly, your Honor.

The Court: You are familiar with the Johnson plant, aren't you?

The Witness: Yes, sir.

The Court: When did you first become acquainted with it?

The Witness: Well, the first Johnson plant, the big Johnson plant—— [398]

The Court: Johnson type.

Mr. Lyon: This type right here, Mr. Wisniski.

The Witness: Well, naturally concrete is accepted more or less as my work through my whole life, and from the time I started at Coulee Dam. I visited every possible plant that I could in practically every city that I was around or any time I had the opportunity, I would visit various plants.

The Court: I know. but you started on the Grand Coulee Dam in 1935?

The Witness: Yes.

(Testimony of William H. Wisniski.)

The Court: Was there any of the Johnson type plants used on the Grand Coulee?

The Witness: Not this type, just the big plant.

The Court: When did you first come in contact with this type?

The Witness: It is probably—let's see. It was after the war, I think, before I really was in contact with one of the plants.

The Court: All right. Let's get this straight now. After the war, you say. That doesn't mean anything. What is the year?

The Witness: Probably 1946.

The Court: All right.

Q. (By Mr. Lyon): In the building of a batching plant, is there any appreciable result obtained by virtue of separately [399] weighing the aggregate and the cement?

A. As far as the mixing action is concerned, there is no great advantage in weighing them separate. That has nothing to do with the mixing action actually, but it has for accuracy of weighing. Cement, naturally, is more costly than the other ingredients, and you try to weigh it with as great accuracy as you can. Naturally, you want to supply the minimum amount of cement without question, and you don't want to overload, so you try to weigh it to the greatest accuracy possible. If you weigh it along with the other ingredients on the same scale, you get a much greater weight that you have to weigh and the graduations of your scale are much further apart, so you can't possibly weigh to



(Testimony of William H. Wisniski.)

nearly the accuracy that you can by separating the cement in a special weighing mechanism and weighing it by itself.

The Court: When did you first come in contact with a mechanism whereby the cement was weighed separately?

The Witness: Well, that was 1935, was the first time there.

The Court: In 1935?

The Witness: Yes, sir, on Grand Coulee Dam.

The Court: You weighed the cement separately?

The Witness: Yes, sir. Each and every ingredient was weighed separately.

The Court: All right. [400]

Q. (By Mr. Lyon): Do you obtain any result by weighing the cement in a hopper by one set of scales within a second hopper supported on a second set of scales which contains the aggregate? Do you get any more accurate weighing?

The Court: Let's have that question.

Mr. Lyon: Would you read the question, please?

(Question read.)

Mr. Sellers: I would like to object to that, your Honor. I don't believe the record shows he has ever operated a plant of that type and ever weighed them, to know.

The Court: Well, let's find out. Have you ever operated a plant like that?

The Witness: I actually have. I have never

(Testimony of William H. Wisniski.)

worked as an operator. I generally have had a job of much higher standing than that.

The Court: Have you observed and watched the weighing?

The Witness: Oh, yes, sir.

The Court: When did you first run into that sort of a procedure?

The Witness: Of what, sir?

The Court: Of weighing the cement inside of a hopper in which the aggregates were weighed.

The Witness: You mean similar to this picture here?

The Court: Yes.

The Witness: That was probably 1947. [401]

The Court: 1947. All right.

Q. (By Mr. Lyon): That was part of your job in those days to inspect plants of this type, and see that they were operated correctly, is that right?

A. Yes, and many times we would actually operate them. As an inspector, I have put in many hours actually operating the plants. I actually operated this plant, not as an operator, but I pinch hit as an operator on rare instances in Kansas City. I know that.

The Court: All right. Now you can answer the question.

Mr. Lyon: Could we read the question again so that the witness will know what it is?

The Court: Could you read Mr. Lyon's question again?

(Question re-read.)

(Testimony of William H. Wisniski.)

The Witness: Well, as I interpret that question, you have reference just to the position of the actual weighing apparatus. Well, regardless of where you put that weighing apparatus, you could have it in the middle or you could have it a half block away, and it is entirely dependent on the accuracy of the equipment itself in the nature of its construction, what accuracy in weighing you get.

Q. (By Mr. Lyon): It is still going to do no more than just weigh the cement and weigh the aggregate, isn't that correct, whether one is within the other or they are a block and a half apart? [402]

A. They are separated, and where the position is isn't going to influence the accuracy in any manner.

Q. So the method of weighing, whether done on a single scale or on a double scale, has nothing to do with the nature of the discharge? Do you understand my question?

In other words, if we use a single scale to weigh both the aggregate hopper and the cement hopper, we don't get any different result insofar as the discharge from the two is concerned than we do if we have them each on separate scales, do we?

A. The discharge is something else. The discharge really has no relation to the weighing. You can discharge in a different manner.

Q. The discharges of the cement hopper could be positioned say to one side of the aggregate hopper, rather than in the center. Would you then ob-

(Testimony of William H. Wisniski.)

tain a different flow than you would if it were centrally located?

A. Oh, I was trying to visualize what you are leading up to. You have it to one side rather than in the middle?

Q. In the center. Just move the cement hopper over to the side and let it discharge over to the side, rather than in the center of the aggregate hopper. Is there any change in the result?

A. The mixing efficiency of the mixer?

Q. Any difference in the discharge of the batching apparatus. [403]

A. Well, there is plants of this description I think you described, and actually, you mean the feeding of that cement into the discharge stream of the other materials?

Q. Yes.

A. It actually feeds in in a satisfactory manner, regardless of whether it is in the side or in the center.

The Court: It doesn't make any difference, in your opinion, whether it is in the center or to one side?

The Witness: No, sir.

Q. (By Mr. Lyon): Does it make any difference whether or not the discharge of the cement hopper is positioned above the discharge of the aggregate hopper? Do you get any different result by virtue of that, or could they be in the same plane? Just slip this down and put it in the same place as

(Testimony of William H. Wisniski.)

that discharge and let them both go. Is it going to make any difference?

A. Would you repeat that?

(Question read.)

The Witness: A lot of that has to do with the nature of the operation itself, what plane you have there, whether you can keep that hopper free by having that gate on the same plane.

Q. (By Mr. Lyon): In other words, it might become clogged by the aggregate? [404]

A. In this sort of plant, if you lower that too far, your aggregate is going to bear up against your batcher and, therefore, the weight of this cement will be influenced so you can't lower it below a certain point or else you will bind the batcher, so you have to keep it up so you won't bind.

The Court: Mr. Lyon, I notice it is 3:00 o'clock. We will take our afternoon recess. We will now recess until 15 minutes after 3:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Lyon): Mr. Wisniski, what are the two major causes of failure of a concrete batch?

A. Oh, by that I would say that you mean the lack of mixing——

Q. Properly.

A. Properly mixing. One thing I found, a very common cause throughout the country, is overloading of batches. That is one very common item.

(Testimony of William H. Wisniski.)

Q. That means that the operator of the batching plant puts too much into the mixing?

A. A Mixer will not mix efficiently if it is overloaded. It is designed for a certain amount and if that amount is exceeded to any great extent, it will not mix properly.

Q. So that when you have been called out to figure out why certain concrete was not being prepared correctly, one of [405] the frequent difficulties you found was that they were overloading their batch in the mixer?

A. Yes, that is very common, because with the transit-mix industry, for instance, they can deliver, say, a yard in excess of the capacity of the mixer just as cheaply as they can the batch the mixer is designed for, so they very commonly overload.

Q. What would be the second cause, now?

A. Oh, another thing that contributes to a great extent is the timing of the sequences of these various ingredients going into a mixer. Oh, I might describe the situation at Coulee Dam, and also other, especially government projects. We had to time the ingredient discharges to split seconds, so that we would have them in the mixer in just exactly the right sequence. We actually used stop watches on the gates that they opened at exact intervals and also pinched down the gates so that they emptied in certain times at certain rates, and that was very critical.

I described before that we actually tried to cut down our mixing time to the least possible amount

(Testimony of William H. Wisniski.)

on that job, because time was particularly of an essence on that job, and they could take the concrete faster than the mixing plant could mix it, so we actually tried to get the operation as efficient as possible, and discharges were timed to, as I said, split seconds. [406]

Q. So no matter what type of batching equipment you are going to run, you can get a good batch from any kind of equipment. If you have a good operator, you can get a good batch of concrete, and if you have a bad operator, you will get a bad batch, is that correct?

A. That is very true, and also the technicians, or whoever he has setting the equipment and controlling it. With any kind of a plant, the best of plants with a poor operator and the equipment not timed properly, you can get lousy concrete or poorly mixed concrete. In any plant, it is very important to time the discharges correctly.

Q. Is that particularly true of the introduction of water into the mixer?

A. Water is very critical. That is one of the critical items in the mixing. You generally lead the batch with water. You start the water before everything else goes down, and maybe some of the coarse rock with the water, and that water is introduced through the whole period of batching while all the other ingredients are passing into the mixer, and you actually have a small amount of water trailing at the very end, so that water is introduced at

(Testimony of William H. Wisniski.)

a very careful rate to that batch to give you the maximum mixing efficiency.

Mr. Lyon: I believe that's all I have. Your witness, Mr. Sellers. [407]

### Cross-Examination

By Mr. Sellers:

Q. Mr. Wisniski, will you tell us something about the flow characteristics of cement? How does it flow? Does it flow like water or what are its characteristics?

A. Well, cement, you generally—it is not exactly free flowing. It flows, oh, when you open a cement batcher, if that material is just freshly introduced, it will flow out quite readily and, oh, empty the batcher completely, but many times if, say, it stays in the batcher for a considerable period, say half an hour or more, you may have to have a vibrator on that batcher to kick it down. Many times in a bin itself, you have to introduce air into that bin to make it flow properly.

Q. Is it desirable to have the flow path of the cement as short as possible, all other things being equal?

A. Oh, the big item in having the path short is that you don't have as many places for it to hang up as if you have a long chute between the actual weighing mechanism and a batch some place that can't clean itself. It is likely to hang up en route.

Q. Have you had experience in plants with see-



(Testimony of William H. Wisniski.)

ing what happened where the cement was hung up?

A. Yes.

Q. Give us an example of one of those cases, will you, [408] please?

A. It will hang up in practically every plant I have been around, it will hang in the batcher, and it has to be vibrated down, requiring quite a little vibration to vibrate down, and most plants have air connected to the batcher itself to aerate the cement, make it flow better.

Q. You would say from your previous statement that the longer the path the cement has to travel, the more places for it to hang up, and the more difficulty in hanging up would be encountered, is that correct?

A. That is correct, and in most places they accomplish not having it hang up, like on a large Johnson plant, generally you have a large collecting hopper, and if the cement came down by itself, it very well would coat that hopper and would hang up in there, but you time your ingredients so that something else knocks it on down. The other ingredients wipe it clean.

Q. You wouldn't recommend feeding the cement into the side of the gathering hopper at one side, would you, by itself?

A. Oh, it is done in many cases and done satisfactorily.

Q. Wouldn't it tend to adhere to the metal surface of the gathering hopper?

(Testimony of William H. Wisniski.)

A. Well, you should have some material passing over that mouth that wipes that gathering hopper clean.

Q. Have you had any difficulty with the conduit in that [409] type of hopper becoming clogged due to moisture? A. Not particularly.

Q. Not particularly. The use of vibrators in these mix plants, isn't that rather objectionable with the noise which they create?

A. Well, plants are naturally noisy in any case, especially where you have a mixer connected. That is very noisy, and the vibrator isn't much noisier than some of the other noises.

Q. In other words, it is just that much more noise?

A. Well, it is that much more noise. It is a necessary noise, I would say, because most hoppers don't empty too well by themselves, or in many cases they might, but you get a condition like I spoke of where if that batch has been in there for a considerable period, you may take quite a lot of vibration to kick it all loose.

Q. I take it that whether or not time is important in the mixing operation is a question of the particular job you are on. On some jobs it is important and on some jobs it isn't important, is that correct? A. Mixing time?

Q. Yes.

A. Well, it depends—that is true in many cases. There are jobs where their mixing plant is of such capacity where it can more than keep up with the requirement or the [410] placing facilities for the

(Testimony of William H. Wisniski.)

concrete. In other places they may have a small plant and will want the concrete much faster than the plant can deliver it, so the mixing time is of essence.

Q. Referring now to the Johnson patent which was pointed out to you on direct, and particularly to Fig. 1, you see the aggregate coming down at the sides, along the sloping sides, and then you see the cement coming down in the center, and at Fig. 2 you see much the same sort of thing.

Wouldn't the aggregate coming down the side, due to the fact that it is sliding along the sloping side, tend to project itself into and under the downwardly falling flow of cement, in your opinion?

A. Well, if you visualize the streams there, both sides have to pass down together, isn't that so?

Q. Yes.

A. Well, doesn't this material block the flow of this past that point?

Q. Would you say, then, that the cement tended to fall right down on top of the converging streams of the aggregate?

A. Well, it must if it is located right over the top of it.

Q. Would you say that the cement fell right into the aggregate?

A. Well, it does fall—the streams [411] converge.

Q. Yes. All right. Now, you have said you didn't know whether any mixing action took place up at this point. Let's assume these streams are

(Testimony of William H. Wisniski.)

falling down, the cement is falling into the converging streams. You have said that you didn't know whether any mixing action took place, and I think you said you rather doubted any did.

Wouldn't it be a fact, with the aggregates falling down, converging together, with the cement falling on top of the converging aggregates, that the cement would essentially, being a lighter substance, go into the voids in the aggregate and become mixed with it?

A. Well, you visualize—well, you take the sand, for instance.

Q. No; let's take the cement. I want to know what happens to the cement.

A. The cement, if this rock is extremely porous, it will enter the voids of the rock immediately adjacent to it, but how far that will penetrate is very questionable.

Q. You have never taken a cross-section right there to determine?

A. No. You can't really see what goes on there.

Q. Therefore, you don't know that it doesn't penetrate and mix at that point; do you?

A. I can't say that it mixes or doesn't mix.

Q. In other words, you don't really know whether it [412] mixes or not? A. No.

The Court: Does anybody know?

Mr. Sellers: No; but this witness said, **your** Honor, it didn't mix, and now I am interested in knowing that he doesn't know whether it mixes or not.

(Testimony of William H. Wisniski.)

The Witness: Well, I was just trying to visualize the actual streams there. To mix, you have got to get a folding and refolding of the material.

Q. (By Mr. Sellers): Do you distinguish, Mr. Wisniski, between mixing and intermingling? Does mixing have a particular meaning in the concrete art? The reason I ask is that I have heard you talk about rolling and rolling over and mixing, as though unless you have the rolling you can't have mixing. Now, supposing we don't have a rolling back and rolling over, but we merely have the streams coming together and the cement going into it. Wouldn't you have intermingling, whether you have mixing or not? A. I am sure it intermingles.

Q. Fine. That's all I wanted to know. You have referred to specifications of mixing times and that you didn't know that any particular specifications had been written for one type of batching plant as distinguished from another. Was that your statement?

A. Well, I might clarify that, because there are two big [413] differences, your dry plant and your wet plant, which make a big difference. Your dry plant, where your concrete is actually mixed in this transit-mixer, and it will generally have a specification for the transit-mixer in that case, and in another case where it is mixed in a wet plant, where it is actually mixed in a central mixer right below the batchers or adjacent, and you will have a certain mixing time specified for that.

Q. Would it be your opinion that these speci-

(Testimony of William H. Wisniski.)

fications of time are usually written in order to insure that even the poorest mix which gets in there will have adequate time to become mixed in the time allotted?

A. That is what they attempt to do.

Q. Yes.

A. But many times even poorly batched material or overloaded mixers, you don't get proper mixing even with that time specified.

Q. So that if the pre-mix or the intermingling which we have identified as possibly taking place or as taking place in the type of plant shown in Plaintiff's Exhibit 14, if there is that intermingling and the concrete is intermingled with the aggregate, the possibilities would be that such a mix, when put in a transit-mix truck, would have certainly a greater probability of being satisfactorily mixed within the time limit than one which is poorly mixed; wouldn't you say?

A. That is a difficult question to answer. The timing, [414] as I explained before, the timing of this material has a great—

Q. Let us assume we have simultaneous discharge of the aggregates and cement, they are all going down together, we do have the intermingling action I referred to, we have the cement and the aggregates being discharged with the cement intermingling. Now, my question would be in that case wouldn't you consider it likely or even more likely that such a mix would fall within the time limits specified than a mix which is poorly mixed, in which

(Testimony of William H. Wisniski.)

the cement was spaced at a distance from the aggregate?

Mr. Lyon: Your Honor, may I object to that question? I don't know what you mean by poorly mixed or spaced. Do you mean the time or distance?

Mr. Sellers: In distance.

Mr. Lyon: In distance.

Q. (By Mr. Sellers): Now, do you understand the question?

A. I am trying to visualize the question. Whether you had a condition like this where you batched your cement, intermingled it right at the point as against—what was your second condition?

Q. The second condition would be one in which the aggregate and the cement go into the mixing truck in a completely unintermingled condition.

A. That is true. I spoke of that experience where they [415] batched the cement on top of the batch and, of course, this condition where you intermingle it to some extent will improve your mixing action; yes.

Q. You use the words "to some extent." As a matter of fact, it would very likely improve it very definitely?

A. To what extent, I can't say.

Q. You believe it would very definitely have an influence in improving it?

A. It would influence the improvement. To what extent, I wouldn't say.

Q. You haven't tested it? You don't know?

(Testimony of William H. Wisniski.)

A. I wouldn't say without testing it. The type of mixer itself would have some bearing.

Q. In the cement flowing down as it does here from the center hopper, protected from the sides, as it would be, the sides of the gathering hopper, the sides of the aggregate hopper, by the aggregate itself, would you not eliminate, in your opinion, any probability of the cement hanging up on the metal walls?

A. You can't eliminate it even with this arrangement entirely. One thing, if this doesn't discharge in the right sequence, which sometimes it doesn't do, all of this material could pass down and some of your cement falling on your bare hopper here, but even it wouldn't stay there in any case beyond the next batch, because this would wipe off from the material [416] passing over it.

Q. Assuming, however, a simultaneous discharge, would not the aggregates tend to eliminate any hanging up of the cement?

A. It wipes it clean.

Mr. Sellers: Thank you. That's all.

The Court: Before we excuse this witness, I want to be sure I get something clear. According to my notes, you testified that back in 1935 concrete was weighed separately from the aggregate hopper.

The Witness: Cement, sir.

The Court: I mean cement was weighed separately from the aggregate.

The Witness: Yes.



(Testimony of William H. Wisniski.)

The Court: There are two different weighing mechanisms?

The Witness: Yes, sir.

The Court: One weighed the cement and the other weighed the rock and gravel?

The Witness: There were actually several. On the big plant at Coulee, there were several.

The Court: The cement was weighed separately?

The Witness: Yes, sir.

The Court: Now, you testified it wasn't until 1947 that you became acquainted with an operation by which there was one hopper inside of another hopper, the inside hopper holding the [417] cement and the outside hopper holding the rock, sand and gravel; is that right?

The Witness: Yes, sir.

The Court: So you didn't become acquainted with the weighing of one inside the other until 1947?

The Witness: It so happened in that period that I didn't have the opportunity to——

The Court: Well, I know. I just want to know if I got your testimony correctly.

The Witness: Yes, sir.

The Court: All right.

Mr. Lyon: I have a couple of questions, your Honor.

(Testimony of William H. Wisniski.)

Redirect Examination

By Mr. Lyon:

Q. Referring now to the Robb patent, does not the aggregate and the cement become intermingled upon falling into the collecting hopper before passing into the mixing truck in the same sense that you were talking about there being a possibility of some intermingling in the——

Mr. Sellers: I believe that has been asked and answered, your Honor.

The Court: Overruled.

The Witness: Naturally, it would, as all the materials fall into the collecting hopper, they must intermingle. [418]

Q. (By Mr. Lyon): Any time you have a batching equipment with a collecting hopper, you have a certain degree of intermingling; is that correct?

A. That's right.

Q. That is always prior to it being discharged into the truck?

A. Regardless of the equipment you have, you have to have a collecting hopper, something that funnels the material down to a small enough chute that it can go into the restricted mouth of the mixer, regardless of the type.

Q. In other words, in all of your experience, in all the plants that you have seen, they have had a collecting hopper of some form in order to screen the material into a shaft small enough to get into the mixer?

A. That's right.

(Testimony of William H. Wisniski.)

Q. And in that collecting hopper a certain degree of intermingling of the ingredients takes place?      A. That's right.

Q. In such an apparatus where you have a collecting hopper, does not the discharge of aggregate wipe the cement from the collecting hopper and prevent it from hanging up?

A. Yes. Your timing and the batching of your materials must be such that you do accomplish that. You must time and batch your materials so that you never do have any cement or sand, too, under that condition hanging up there. [419]

Mr. Lyon: Thank you. That's all I have.

The Court: May this witness be excused?

Mr. Sellers: I would like to ask one question.

The Court: All right.

### Recross-Examination

By Mr. Sellers:

Q. Didn't you say on direct, Mr. Wisniski, in the Robb patent construction which counsel just pointed out to you, that there was the very minimum of mixing action in that gathering hopper?

A. Well, he didn't say mixing. The question he asked was, is there any intermingling there. Well, there is as much intermingling in any gathering hopper.

Q. I don't believe that the record will show that counsel used the word intermingling in his direct examination. I think you said there was a minimum

(Testimony of William H. Wisniski.)

of mixing action. Do you recall, or can we check the record on that?

The Court: Well, now, the record speaks for itself.

The Witness: Well, probably the reason I didn't use intermingling there was you brought up the point and introduced the term of intermingling to me.

Mr. Sellers: I move to strike that as not responsive to my question.

The Court: It may go out. [420]

Mr. Sellers: Your Honor, I believe the record would show that the witness, in honesty I admit, has stated two different facts in his direct and in his redirect.

The Court: It is up to the court to evaluate the testimony of this witness.

Mr. Sellers: You would rather not take the time to check it?

The Court: I don't want to take the time to go back and check the record.

Mr. Sellers: Thank you, your Honor.

The Court: May this witness be excused?

Mr. Sellers: Yes.

The Court: You may be excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Lyon: Mr. Stromberg, please.

MERLE STROMBERG

called as a witness by and on behalf of the plaintiff, having been heretofore duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lyon:

Q. I show you Exhibit 14, indicating the means for [421] dispersing water into the aggregate shaft, and ask you how many of such means have you ever manufactured?       A. One.

Q. And that means was positioned on what plant?       A. The Stanton plant.

Q. Have you ever had contact with any other such means?       A. Yes.

Q. Where was that?

A. One was installed by the Conveyor Company on the Gardena plant. It was in operation about five or six months. They found out that it had a plugging action at the discharge end. It was taken off and used for the purpose of burning papers and other materials.

Q. So you did not place that particular water dispersing means on that Gardena plant?

A. No.

Q. You were merely asked to remove it?

A. The one that was removed was not placed there by me.

Q. So that you have made only one of these devices and installed it; is that correct?

A. Yes.

Q. You testified on your deposition, I believe,

(Testimony of Merle Stromberg.)

that the majority of your plants—I forget the words counsel used—were of the Johnson type at that time, and you testified, when [422] asked the question later, as of this date that some 50 per cent of your plants had a hopper within a hopper.

Why did you change your construction from this type to the side entering type? Was that on the advice of counsel?

The Court: Well, we don't have any testimony here that he changed the construction, as far as I know.

Mr. Sellers: Thank you, your Honor.

Mr. Lyon: He made an effort to point out the inconsistencies in Mr. Stromberg's testimony and I am trying to clarify it.

The Court: That may be true, but he hasn't testified he changed his design.

Mr. Lyon: Pardon me. I will ask the question again.

The Court: You can ask him if he did.

Mr. Sellers: The record shows, your Honor, he stated the drawing there was typical of all the plants he has made.

The Court: All right. Proceed.

Q. (By Mr. Lyon): Have you made a side entry plant? A. Yes.

Q. When did you start making those plants, do you recall?

A. About three and a half years ago, I believe, was my first one.

Q. Did you stop making this type of a batching

(Testimony of Merle Stromberg.)

apparatus at one time? [423]           A. Yes.

Q. Why did you stop?

A. On the advice of my counsel at that time.

Q. So that at the present date approximately 50 per cent of the plants that you have constructed are of this type; is that right?

A. Of that means of aggregate hoppers and cement hoppers in the center on separate scales.

Mr. Lyon: That's all the questions I have.

The Court: Now, counsel, restrict your cross-examination to the problem that has been presented.

Mr. Sellers: Thank you, your Honor.

#### Cross-Examination

By Mr. Sellers:

Q. In the plant we are looking at, as illustrated in Plaintiff's Exhibit 14, are the bins marked sand, gravel, and sand, part of the plant?

A. Part of the plant? .

Mr. Lyon: Object to that, your Honor. That goes beyond the scope of the direct examination.

The Court: Sustained.

Mr. Lyon: I asked him two questions.

Mr. Sellers: All right.

Q. In the drawing shown in Plaintiff's Exhibit 14, do [424] we show a gathering hopper as a part of the plant?

Mr. Lyon: I will object to that as beyond the scope of the direct examination.

The Court: Overruled.

(Testimony of Merle Stromberg.)

Mr. Lyon: I asked him only about two points.

The Court: This is preliminary. The water apparatus is part of the gathering hopper.

The Witness: Will you repeat the question?

Mr. Sellers: Will you repeat the question?

(Question read.)

The Witness: Yes; you show it as part of the plant.

Q. (By Mr. Sellers): Is the water discharge means a part of the gathering hopper?

A. Yes.

Q. And is it not a fact that you have stated that the illustration we have embodied in Plaintiff's Exhibit 14 is typical of all the plants you have made of the type in which a center hopper is positioned between the portions of aggregate?

Mr. Lyon: I will object to that, your Honor.

Mr. Sellers: I have the right to cross-examine this witness to point out, your Honor, that he stated the same thing differently two different times.

The Court: Overruled. Read the question.

(Question read.)

Q. (By Mr. Sellers): Have you or have you not so stated? [425]

A. Of this type, yes.

Q. Then you agree, then, that in the plants of the type embodying the centrally positioned cement hopper, and the position between the aggregate hop-



(Testimony of Merle Stromberg.)

pers, that the showing of Plaintiff's Exhibit 14 is typical?

A. It is if two scales are used, yes.

Q. You have stated on direct that you stopped making one type plant. What type plant was it you stopped making?

A. I haven't stopped making any type of plant. On the advice of my counsel I have refrained from building an aggregate hopper with partitions in it for a separately hung cement hopper.

Q. When did you begin your refraining from building that type of construction?

A. Well, it was in 1955, some time during 1955. I would say about the middle of 1955.

Q. That was after you built the Stanton plant, was it?      A. Yes.

Q. I would like to know how you bring into agreement the fact that the showing here in Plaintiff's Exhibit 14 is typical of all the plants you have made of this type, when you stated on direct examination to your counsel that the other plants you made did not have water feed as shown here?

Mr. Lyon: Your Honor, I will object to that as argumentative. Counsel's terminology in his question initially was, [426] is this typical of your plants showing a hopper within a hopper construction? It did not extend to the whole plant or the whole details.

The Court: As I remember the original examination, no mention at all was made of the water feed. In fact, you are the one who brought up the water

(Testimony of Merle Stromberg.)

feed. I did not know the water feed was in this case.

Mr. Lyon: It is in Claim 5, your Honor.

The Court: That's all right, it is in the claim, but as far as the testimony was concerned, I don't think this witness was asked anything about the water feed.

Mr. Lyon: I agree with your Honor. The question he asked on direct examination did not incorporate that feature.

The Court: You are the only one who asked about water feed.

Mr. Lyon: That's right.

Mr. Sellers: My point is, your Honor, he has stated he didn't make plants with gathering hoppers in any plant other than this plant, I believe.

The Court: No. My understanding is he didn't make a plant with this particular kind of water feed.

Mr. Sellers: All right.

The Court: The watering feed is only part of the gathering hopper.

Mr. Sellers: All right, your Honor, I will accept that, [427] your Honor, but the witness has testified on cross that this drawing showing this construction is typical of all the plants.

The Court: Generally typical. We were talking, as far as I know, about the center hopper being within the aggregate hopper, and I thought that was the issue here.

(Testimony of Merle Stromberg.)

Mr. Sellers: That is, but claim 5 also brings in the water feed, your Honor.

The Court: You didn't ask about the water feed. The fact of the matter is until Mr. Lyon asked the question, nobody had asked a question about the water feed.

Mr. Sellers: Well, it has been stated on cross examination, your Honor, that the water feed is a part of the gathering hopper, which is shown here, and he has stated that is part of the plant.

The Court: That's right.

Mr. Sellers: And he has also stated that the showing here is typical of all the plants.

The Court: I know what he stated.

Mr. Sellers: All right. I shall let it rest at that. That's all, your Honor. Thank you.

Mr. Lyon: No further questions.

The Court: It's nearly 4:00 o'clock and I don't think we will call another witness until in the morning.

Mr. Lyon: That's all. You may step down, Mr. Stromberg. [428]

(Witness excused.)

The Court: Court will stand in recess until 10:00 o'clock tomorrow.

(Whereupon, an adjournment was taken to 10:00 o'clock, a.m., Friday, March 16, 1956.)

Friday, March 16, 1956—10:00 A.M.

The Clerk: No. 17,121-HW, C. S. Johnson Company vs. Merle W. Stromberg, et al., further trial.

Mr. Lyon: Mr. Murasko, will you take the stand, please?

VERNON MURASKO

called as a witness by and on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, sir?

The Witness: Vernon, V-e-r-n-o-n, Murasko, M-u-r-a-s-k-o.

Direct Examination

By Mr. Lyon:

Q. What is your present occupation, Mr. Murasko?

A. Plant Superintendent for Western Concrete Company in Los Angeles.

Q. What is your age, sir? A. 52.

Q. What was the first occupation you had?

A. My first occupation was working for the American Can Company in San Francisco when I graduated from school.

Q. When did you have that job?

A. Probably in 1916.

Q. Where were you employed in 1920? [432]

A. In 1920 I was a stevedore for Matson Navigation Company.

Q. In 1921 where did you go to work?

A. I went to work for Bode Gravel Company

(Testimony of Vernon Murasko.)

or Bode Mixed Concrete Company. They are recognized under both names.

Q. What were your duties for the Bode Company?

A. In 1920 I was a truck driver for them.

Q. How long did you continue as a truck driver?

A. I drove a truck for them until 1929.

Q. At which time you undertook what duties?

A. Well, I was out of their employ during the depression for a period of several months in the latter part of 1929. I went back to work for them as a plant operator in 1930.

Q. What kind of plant were you operating?

A. Wet mix concrete plant.

Q. Where was this plant located?

A. On Geneva Street and Tara Street.

Mr. Sellers: Your Honor, I should like to object to this entire line of testimony for the reasons we have previously discussed. There has been no notice.

The Court: I don't know. He is laying a foundation. I don't know what he is leading up to. Maybe you know more than I do.

Mr. Sellers: I think I do, your Honor. [433]

The Court: Let's wait until it develops.

Mr. Sellers: All right. I want the record to show though, I think it is for anticipatory purposes and I do object.

Q. (By Mr. Lyon): How long did you operate the Geneva plant?

A. Oh, for a period of about six months.

Q. Then where did you go, sir?

(Testimony of Vernon Murasko.)

A. The company I was working for decided to construct another plant at 235 Alabama Street in San Francisco, and due to the success I made of operating the Geneva plant, they put me down there before that plant was completed to learn the details of it and to operate it. It was in the downtown area of San Francisco, a major installation.

Q. I now show you Plaintiff's Exhibit A for identification and ask you if this drawing illustrates the construction of the aggregate and cement hoppers in that plant.

A. I worked with the firm——

The Court: Wait a minute. You say that plant. Which plant?

The Witness: That is the Alabama plant.

Mr. Lyon: The Alabama Street plant.

The Court: When was the Alabama plant established?

The Witness: 1931.

Mr. Sellers: I wish to object, your Honor. There has [434] been no proper foundation laid for this drawing.

The Court: What do you mean? Isn't the drawing in evidence?

Mr. Sellers: It has been marked, but he is about to identify it as being connected with the plant he worked for. It has not been established who made the drawing.

The Court: What is the number?

Mr. Sellers: Or its accuracy.

Mr. Lyon: It is Defendants' Exhibit A.

(Testimony of Vernon Murasko.)

The Court: Is A in evidence?

The Clerk: No. It is marked for identification.

Mr. Lyon: I am trying to lay a foundation for it at the present time.

Mr. Sellers: Did this gentleman make the drawing?

Mr. Lyon: If you will permit me to interrogate him further, Mr. Sellers, I believe I can establish his knowledge of the drawing.

The Court: Objection overruled.

Q. (By Mr. Lyon): At the time that the Alabama Street plant was being constructed, did you see drawings of that plant?

A. I saw a drawing similiar to this.

Q. It showed the same details as this?

A. Same details, yes.

Mr. Sellers: I object, your Honor, to the leading [435] question. This is very critical and I don't believe the witness should be led.

The Court: There has been a lot of leading questions in this case by both sides. I think you have been just as much at fault as far as leading questions are concerned.

Mr. Sellers: There were no objections, your Honor.

The Court: Yes, but I noticed there were leading questions. All right. Don't lead the witness.

Mr. Lyon: I will try not to.

The Court: May I inquire? You said when you quit school. What school did you quit?

(Testimony of Vernon Murasko.)

The Witness: I graduated from the Columbia Grammar School in San Francisco.

The Court: You didn't go beyond the grammar school stage?

The Witness: No, sir.

The Court: You had no engineering experience?

The Witness: No, sir, I did not.

The Court: Have you had any engineering training relative to the drawing of blueprints?

The Witness: No, sir, at that time, no.

The Court: Since then?

The Witness: Since then I have constructed 15 complete plants.

The Court: You have constructed. Were you in charge? [436]

The Witness: That's right. I am in charge of building a plant at Costa Mesa right now.

The Court: From blueprints?

The Witness: Yes.

The Court: And from plans and specifications?

The Witness: Right.

The Court: How long have you been building these plants from plans and specifications?

The Witness: Let's see. On my own——

The Court: You say you built 15 of them?

The Witness: I started in 1942 in Nevada. I constructed three plants there. I made a good reputation for myself and the company I was working for brought me to Los Angeles.

The Court: Well, we know your reputation is good and all that, but I am not interested in your



(Testimony of Vernon Murasko.)

reputation. I am interested in your background relative to the reading and interpretation of plans and specifications and drawings.

The Witness: Certainly from experience on the job.

The Court: In the building of these plants, you had to read plans and specifications?

The Witness: That's right.

The Court: Interpret blueprints?

The Witness: That's right.

The Court: How many years have you been doing that?

The Witness: Since 1931. [437]

The Court: Since 1931?

The Witness: I operated this particular plant, yes, and I rebuilt it, rebuilt the Geneva plant. I put up plants or rebuilt plants in the Los Angeles area for various companies besides the company I worked for because of my experience.

The Court: Do you want to take this witness on voir dire relative to his qualifications to read blueprints?

Mr. Sellers: Yes, your Honor.

The Court: You may take the witness on voir dire.

#### Voir Dire Examination

By Mr. Sellers:

Q. What is your educational background, please? A. Grammar school.

(Testimony of Vernon Murasko.)

Q. From grammar school you went to work as a stevedore?

A. No. I went to work for the American Can Company.

Q. Then later you became employed as a stevedore? A. That's right.

Q. Then later you went to work for the Bode Gravel Company, Bode Mixed Concrete?

A. That's right.

Q. In that connection you were a truck driver?

A. That's right.

Q. Did you have any contact with drawings at that time? A. No, I didn't. [438]

Q. When the Alabama Street plant was constructed, did you have anything to do with the design of that plant? A. No, I did not.

Q. What was your employed position with the company at that time?

A. I was the operator of their Geneva plant, and this business, ready-mix concrete business, was in its infancy at the time.

Q. Please. That is not responsive.

A. I see.

Q. What were your duties in your position with the company at that time?

A. To help build that plant and learn how to operate it.

Q. Do you know who made the drawings for that plant?

A. Bodinson Manufacturing Company.

Q. Who?

(Testimony of Vernon Murasko.)

A. Bodinson Manufacturing Company, B-o-d-i-n-s-o-n.

Q. I would rather you speak from your own recollection, please.

A. I remember the man that built it.

Q. Bodinson Manufacturing Company made the plant?      A. That's right.

Q. Who was the engineer in charge of that company?      A. Jones, Senior. [439]

Q. Do you remember his first name?

A. At times I do and at times I don't.

Q. How about this time?      A. No, I don't.

Q. Just Jones, Senior?      A. That's right.

Q. Was there a Jones, Junior?

A. I met his son since then. He must have had the son at that time.

Q. He must have had a son, but you don't know?

A. No, he did have a son.

Q. Are you sure?      A. Positive.

Q. Where was he?      A. I don't know.

Q. Did you see Mr. Jones, Senior, make any drawings for the Alabama Street plant?

A. No, I did not.

Q. Do you know whether or not he made any drawings?

A. He was supposed to have made them. He was the engineer for Bodinson Manufacturing Company.

Q. Do you know where Mr. Jones, Senior, is now?      A. Mr. Jones, Senior, is dead.

Q. How do you know that?

(Testimony of Vernon Murasko.)

A. He was in an automobile accident with Mr. Bodinson [440] going North.

Q. Were you there at the time?

A. No, I was not.

Q. You merely heard about it?

A. That's right.

Q. You don't know it to be a fact of your own knowledge?      A. I don't.

Q. You didn't attend the funeral?

A. I didn't attend the funeral, but I know a lot of people that were there.

Q. You don't know who made the drawing, the drawing that is the original of this?

A. I presume Jones, Senior, made the drawings.

Q. But you didn't see him make them?

A. No.

Q. Did he tell you that he made this?

A. No, he didn't.

Q. Did he tell you what scale he made that drawing to?      A. No, he didn't.

Q. Did he tell you he made it accurately?

A. No, he didn't.

Q. Didn't tell you he made it at all, did he?

A. No, he didn't.

Q. As a matter of fact you don't know who made it? [441]      A. I presume——

Q. No. Do you know?

A. I don't know who made it.

Q. You don't know where the original has been from that time up to this, do you, the original of this ozalid print?      A. No.

(Testimony of Vernon Murasko.)

Mr. Sellers: Do you think he is qualified to testify concerning this drawing, your Honor?

The Court: Well, he may not be qualified to testify as to drawings, but he is certainly qualified to testify how he built the plant, if he built it.

Mr. Lyon: If your Honor please, I have somebody else to testify to the drawings. All I want this man to testify to is how he built it.

Mr. Sellers: All right, then, if you will admit that he can't identify the drawings, we will go on to the plant.

Q. You say you built the plant?

A. No, I did not.

Q. What did you do?

A. I was helping to build the plant so I would know how to operate it.

Mr. Lyon: Your Honor, I thought he had him on voir dire to question his ability to recognize this drawing, not to cross-examine him as to his whole testimony, which hasn't been [442] given yet.

Mr. Sellers: How can he recognize the drawing? He never saw the original.

The Court: Well, Mr. Lyon says he is not going to offer the drawing upon the testimony of this witness. That was the only purpose of the voir dire, and I think possibly you have established your point.

Mr. Sellers: I would like to establish a little bit more, if I may, your Honor, whether or not at the time he built the plant he had any experience in reading drawings.

(Testimony of Vernon Murasko.)

The Court: All right. You can do that.

The Witness: I did not.

Q. (By Mr. Sellers): I beg your pardon?

A. I did not.

Q. Do you have any recollection that at the time that plant was built you ever saw the original of this particular drawing?

A. I saw a drawing similar to this.

Q. What do you mean by similar?

A. The same type of drawing, the same scale, the same hoppers, because I operated those hoppers for 15 years.

The Court: You say you operated them?

The Witness: I did.

Q. (By Mr. Sellers): That was before or after this drawing? [443]

The Court: That was after the plant was established. He couldn't do it before the plant was built.

Mr. Sellers: That is correct.

Q. At the time, however, that plant was built, you had no experience in reading drawings whatsoever? A. None whatsoever.

Q. So as of that time you were unskilled in the reading of drawings, you really were unable to determine what a drawing showed at that time, weren't you?

A. I will have to answer you in different languages, yes and no. There is no detail to this. There was a picture, a sketch, and it was easy to recognize when the original metal was in front of you.

(Testimony of Vernon Murasko.)

Mr. Sellers: Well, I move to strike that as not responsive.

The Court: Denied.

Mr. Sellers: I would like to know, also, how you know what the sketch was if you didn't see the original drawing at that time. You said you saw a similar drawing, but you didn't see this drawing, did you?

The Witness: I saw one tracing the same as this one.

Q. (By Mr. Sellers): It was similar, wasn't it?

A. That's right.

Q. But you never saw this drawing before?

A. I don't know how many drawings were made before. [444]

Mr. Sellers: Your Honor, I respectfully represent that this gentleman at the time this drawing was represented to be drawn——

The Court: We are not questioning the drawing now. The drawing is out of the picture at this time. He can testify to what he did and saw regardless of the drawings, can't he?

Mr. Sellers: He certainly can, but I want to prevent this drawing getting in if I can.

The Court: Well, it hasn't been offered yet, as far as I know. If it is offered, the offer is refused at this time.

(Testimony of Vernon Murasko.)

Direct Examination

(Resumed)

By Mr. Lyon:

Q. Now, when you were operating the Geneva plant and were transferred to the Alabama Street plant, what was the condition of that plant? Was it fully constructed or not at the time you shifted?

A. The Alabama plant, you are speaking of?

Q. Yes, the Alabama Street plant.

A. The structure was built, but it was not being operated. It was minus the machinery.

Q. Minus the batching equipment?

A. That's right.

Q. The physical structure was there?

A. Yes. [445]

Q. What was that made of?

A. The structure was made of wood.

Q. Were you present while the batching equipment was being constructed?

A. I was present while it was being installed.

Q. In other words, it had been constructed somewhere else and brought there and installed in the structure that was there at the time you were there?

A. That's right.

Q. Do you know who built the batching equipment?

A. Bodinson Manufacturing Company.

Q. Did you help in the installation of this batching equipment in this structure?

A. I helped install these same hoppers.



(Testimony of Vernon Murasko.)

Mr. Sellers: Your Honor, I am going to object to these leading questions.

The Court: Overruled.

Q. (By Mr. Lyon): What was the construction of the hoppers? A. The hoppers were steel.

Q. How many hoppers were there in the batching equipment? A. Two.

Q. One for the aggregate and one for the cement? A. Correct. [446]

Q. How were they disposed with respect to each other?

A. The cement hopper hung inside of the aggregate hopper.

Mr. Sellers: Your Honor, I wonder if we may not ask that the drawing be removed from in front of the witness while he is testifying.

The Court: All right.

Mr. Sellers: There has been no basis laid to refresh his recollection from the drawing.

The Court: It may be removed.

Mr. Lyon: He has already testified he has seen it, but he doesn't need it.

The Court: Just a minute now.

You helped to construct this Alabama Street plant?

The Witness: I really helped to install the machinery.

The Court: You helped to install the machinery, you helped to install the hoppers?

The Witness: Yes.

The Court: Of your own recollection, you now

(Testimony of Vernon Murasko.)

say that the cement hopper was inside the aggregate hopper?

Mr. Sellers: He hasn't said that, your Honor.

The Witness: Yes, sir.

The Court: That is exactly what he said.

Mr. Sellers: I beg your pardon. I didn't hear him say it. [447]

The Court: Do you know whether or not there was a weighing apparatus connected to the cement hopper and the aggregate hopper?

The Witness: There were separate Krone dial scales connected to each hopper.

The Court: Independent of each other?

The Witness: Right.

The Court: This was in 1931?

The Witness: 1931.

Q. (By Mr. Lyon): How long did you operate the plant under those conditions?

A. I operated the plant physically for about ten years, and then I was made superintendent of the complete company.

Q. At the time this Alabama Street plant was constructed, where were the discharges of the cement hopper and the aggregate hopper disposed with respect to each other?

A. On the bottom.

Q. Was the cement hopper discharge positioned above the aggregate hopper discharge?

A. The discharge was above——

Mr. Sellers: I object to leading the witness, your Honor. He is leading the witness.

(Testimony of Vernon Murasko.)

The Court: Don't lead the witness. The witness can testify as to where the discharge of the cement hopper was relative to the discharge of the aggregate hopper. [448]

Mr. Lyon: All right.

Q. Can you draw for me a view of the hopper construction both from a side elevation, and then show me a second drawing of the discharges and their location with regard to one another?

A. Yes, I can. The discharge gate is here. There were baffles built like that within about four inches of this gate.

Q. Pardon me just a minute. Would you mark this gate with an A, just draw a lead line and mark it with an A?

A. The cement scale, the counter of it was the same as the——

Q. The cement hoppers?

A. The cement hoppers.

Mr. Sellers: I suggest you let him describe it.

The Witness: They hung here inside and the gate was here.

Q. (By Mr. Lyon): Would you like to label that gate with a B, please?

A. Looking at it from the top, your aggregate hopper was built like this. This is a section here.

Q. What does that represent?

A. That represents this baffle plate.

Q. Will you mark the baffle plate with a C, please? Just draw a line and mark it with a C, and would you do the same in the other drawing? [449]

(Testimony of Vernon Murasko.)

A. That was to give the hopper strength so these would not collapse. The cement hopper hung inside of it and was suspended with four long bolts to the ceiling.

Q. Just a moment, please. Would you label the cement hopper in the same manner except with a D?

A. All right.

Q. And also in this other view? A. Yes.

Q. Would you label the aggregate hopper with an E in both views? A. (Witness complying.)

Q. Now, will you continue your description, please?

A. Well, that takes care of it. Each hopper was suspended with four bolts from the ceiling, four bolts on the cement hopper and they supported the scale mechanism with a lever from this cement hopper, which was a little bit higher than the aggregate hopper. The beams of the weighing mechanism was there, and the lever came out to the side here and hooked to a dial scale.

Directly opposite that, the dial scale for the aggregate hopper was suspended from here.

Q. Will you mark that F, the scale for the aggregate hopper? A. (Witness complying.)

Q. Now, let's mark the figure 1 and figure 2, would you, [450] please?

A. (Complying.) I made a slight error here. I made an E instead of an F.

Q. Looking at figure 1, where is the cement hopper discharge located with respect to the aggregate hopper discharge?

(Testimony of Vernon Murasko.)

A. Approximately 12 inches above the aggregate hopper gate. This aggregate hopper gate had to be opened, and then you would open the gate on the cement hopper and it would go into the mixer.

Q. Just a minute. Pardon me, please.

A. All right.

Q. So the difference between A and B in figure 1 was substantially 12 inches, is that correct?

A. That is from bottom to bottom.

Q. Referring to figure 2, now, would you explain the relationship of the cement hopper discharge to the aggregate hopper discharge?

A. The aggregate hopper discharge had to be open to let the cement go out with it. In other words, you could open your cement discharge, but nothing would go out of that scale until the aggregate hopper gate was open, and then all your materials would come out together.

Q. Yes, but I am trying to find out where they were positioned. Off to the side, or something like that?

A. They were dead center, one above the [451] other.

Q. Positioned below the aggregate hopper was there anything between this mechanism and the truck or mixer in which it was discharged?

A. There was a stationary mixer. These two hoppers discharge into a stationary mixer. The concrete was mixed, dumped into a hopper, and there was an air gate on the hopper which would be

(Testimony of Vernon Murasko.)

opened by the driver of the mixer truck and the concrete would go into the mixer truck.

Q. You operated the plant in this condition from 1931 until when?

A. From 1931 until the last day of May, 1942.

Q. Was there anyone else present who operated that plant during that period?

A. A man by the name of Cornett worked for me. That is C-o-r-n-e-t-t.

Q. Did Mr. Cornett operate the plant during this period?

A. He operated very often. While I was superintendent, he was the operator.

Q. Did anyone else operate this plant besides you and Mr. Cornett?

A. A man who now is dead. Cahill is his name, C-a-h-i-l-l.

Q. What were some of the jobs upon which concrete mixed from this plant was used, can you recall? [452]

A. The Federal Building in San Francisco, the War Memorial Building in San Francisco, Sunset Reservoir in San Francisco, various sewer jobs, various buildings.

Q. Any particular structure built during that period of time which would help you locate in time when this plant was being constructed or operated?

A. One of the first jobs that this plant serviced was Letterman Hospital in San Francisco.

Q. Do you recall when the hospital was built?

(Testimony of Vernon Murasko.)

A. We were pouring concrete there in 1932 and 1933 on sidewalks, curbs and gutters.

Q. Did you use any concrete from this plant in any of the bridges in San Francisco?

A. We did.

Q. Which bridge?

A. The San Francisco Bay bridge.

Q. When was the San Francisco Bay bridge built, to your recollection?

A. My recollection would be around 1938. I am not sure.

Q. Are there any other buildings that concrete poured from this plant went into that would help you locate the point of time when all this occurred?

A. Why, yes. There was a reservoir being built in San Francisco they call the University Mound Reservoir. [453]

Q. About when was that constructed?

A. That would be about 1931. It was an addition and a repair job.

Q. Did this plant have any mechanism for inserting water into the mixture of cement and aggregate?

A. On the side of the aggregate hopper was a tank.

Q. Would you draw that in figure 1, please?

A. Well, figure 2 would be much better.

Q. Figure 2, if it is easier.

A. This here was built right on the side.

Q. Will you label that G, please?

A. (Witness complying.) Discharge pipe free

(Testimony of Vernon Murasko.)

of the hopper so it would not interfere with the weighing. We weighed our water and there was a separate lever on it.

The Court: You say you weighed the water?

The Witness: Weighed the water, yes.

The Court: All right.

The Witness: The tank was on a side view like this.

Q. (By Mr. Lyon): Label that G again, please, sir.

A. And there was a valve here and the water was weighed, with flexible line coming down to the mixer hopper here so that it would not interfere with the action of the scale. The water was weighed first. The cement, gravel and sand were weighed simultaneously.

The Court: How was the water inserted into the mix? [454] Just one stream?

The Witness: One steady stream.

The Court: Just one steady stream?

The Witness: That's right. The weighed water would discharge.

Q. (By Mr. Lyon): Would you describe the typical operation that you performed in batching concrete using this apparatus? Take us through the steps.

A. We would start weighing our cement, because it was slow weighing them days, and we would weigh our water while our cement was being weighed. Would weigh our gravel and sand.

Q. Pardon me just a moment. When you say



(Testimony of Vernon Murasko.)

weigh, let's follow the flow of the materials from some place to some place and see where they are weighed and how they are weighed.

A. We would weigh the cement that was fed from a tank directly overhead with a rotary feeder.

Q. Would you label that H, please? Thank you.

A. The cement would go into this here cement hopper. It had an automatic cut-off when it was first installed, and while it was being weighed automatically, I would weigh my water and weigh my gravel and sand.

Q. Now, let's get the gravel and sand into the aggregate hopper so we can weigh it.

A. There were eight gates above this hopper here, each [455] for a different size material. Eight gates here and the cement here.

Q. Would you label one of those gates as I?

A. (Witness complying.)

Q. Thank you. And through those gates from a bin your aggregate material was poured into your aggregate hopper? A. Right.

Q. And in the aggregate hopper, then, the accumulation was weighed?

A. We use the cumulative weight on a dial scale.

Q. Now, with the cement in the cement hopper and the aggregate in the aggregate hopper, what was the next step in the operation?

A. We would open both gates simultaneously and leave the material, gravel, sand and cement and also the water, go into the stationary mixer.

(Testimony of Vernon Murasko.)

The Court: You turned it all on at the same time?

The Witness: All at the same time.

The Court: Including the water?

The Witness: Including the water.

The Court: Was there any problem of the water getting into the aggregate hopper? I mean into the mixing hopper first?

The Witness: It would make no difference. It was only a 28 S, one yard mixer, and was approximately 30 gallons. We [456] used about 250 pounds of water per yard on the average.

The Court: It wouldn't make any difference whether the water went in first?

The Witness: It wouldn't make any difference if the water went in first.

The Court: It wouldn't cause any balling?

The Witness: No, not in that size mixer.

The Court: So the water, the sand and gravel and cement were all turned on at the same time and they all went down this mixing hopper?

The Witness: That's right.

Q. (By Mr. Lyon): During the discharge, did the aggregate, the discharge from the aggregate hopper surround the cement discharged from the discharge hopper?

A. That was one of the features for having it built that way, because it did have a tendency to hold down the dust. The gravel and sand would come down and the cement would go down the center of it, and our feeding hopper to our mixer,

(Testimony of Vernon Murasko.)

stationary mixer, was built very steep. The gravel and sand would flow on it with a minimum amount of cement sticking to it. That was the principle of this design.

Mr. Lyon: I believe that's all the questions I have.

The Court: Now, Mr. Sellers, in order to preserve your record, I will entertain a motion relative to the striking of the testimony of this witness relative to the fact that you [457] didn't have notice.

Mr. Sellers: I do make such a motion, your Honor. Thank you.

The Court: You had better state your motion just exactly as you want it in the record. You said this is important and I agree with you it is important, so I want the record to show your motion as you want it.

Mr. Sellers: Your Honor, I wish to make the motion that the testimony of this witness be stricken in its entirety, the defendant having failed to comply with the provisions of 35 U.S.C., 282, requiring the giving of 30 days' notice prior to trial of prior public use, and including the other provisions with which he has failed to comply. I believe while it is a fact that the matter rests within the discretion of your Honor, yet in this case the exercise of that discretion in favor of the defendant is not to be indicated. I don't think you want an argument at this time. There is my motion.

The Court: No, I don't want an argument, but I want to ask you a question. Because of the testi-

(Testimony of Vernon Murasko.)

mony here and the production of this witness, this knowledge will become general among the trade. The next time you attempt to establish a patent or the next time you file a suit for infringement of this patent, if the patent is sustained, they will raise a question whether or not there is prior use. Wouldn't that be a good defense in a subsequent suit? [458]

Mr. Sellers: That would be important were it not a fact that the patent has expired. In other words, we are here seeking damages for past infringement. The patent has expired and—well, there could be more suits.

The Court: You mean to say the only thing you are interested in in this case is damages?

Mr. Sellers: Yes, your Honor.

The Court: It is not a question of the establishment of your patent?

Mr. Sellers: The patent has expired, your Honor.

The Court: So what you are fighting for here is damages?

Mr. Sellers: That is correct.

The Court: The motion is denied.

Mr. Sellers: May I ask your Honor how the fact we are fighting for damages—

The Court: Well, this is purely within the discretion of the court.

Mr. Sellers: Yes, your Honor. On that basis I have nothing to say.

The Court: If I believe the testimony of this witness, here was a plant that was built practically

(Testimony of Vernon Murasko.)

identical to the plant you claim to have a patent on.

Mr. Sellers: That fact was not known to us, of course, your Honor. [459]

The Court: That doesn't make any difference. Your patent wouldn't have been good. You are asking for damages on a patent that from this testimony, if I believe it, was no good.

Mr. Sellers: If you believe this testimony and if this testimony is properly before the court. Whether or not the patent is no good is a question of fact and I would respectfully contend, your Honor, it is our position that this evidence should not be here.

The Court: I thought there was a statement the other day by someone, I don't know who it was, to the effect that there was a patent infringement case on this patent pending in Chicago.

Mr. Sellers: To clarify that, your Honor, there was. It was a case—rather, let's put it this way. This patent, as I understand it—I was not a party to that action, but this patent was involved in a declaratory relief portion of an action back in Chicago, but I think possibly Mr. Denny can answer this question much more accurately than I can, your Honor, because he was there. If you want to know, I will ask him to tell you, your Honor.

The Court: I am interested—don't patents run for 20 years?

Mr. Sellers: 17 years, your Honor.

The Court: 17?

Mr. Sellers: Yes. [460]

(Testimony of Vernon Murasko.)

The Court: I thought it was 20. Wasn't it formerly 20 years?

Mr. Sellers: No, your Honor, not in the recent past. Trade-marks are 20. If you would like to hear about the case back in Chicago——

The Court: No, no. I was under the impression from what was stated here that you were trying to establish the validity of your patent.

Mr. Sellers: We must do that in order to recover, your Honor.

Mr. Lyon: May I call your attention to the fact there was another case filed in this District Court against the Lee Valley Ready-Mix Company, which was settled out of court. The number of that action was one number below or one number above the number assigned to this action, so this patent has been enforced against other parties before its expiration.

Mr. Sellers: I don't say that. I don't mean to imply that, and I wouldn't. The question was whether or not there was a suit pending in Chicago. There was a suit back in Chicago and this patent came in, but it was never adjudicated, as I understand it.

Is that correct?

The Court: Well, I guess maybe I was misled by your complaint, because the prayer of the complaint says, "Wherefore plaintiff prays for a preliminary and final injunction against [461] further infringement."

Mr. Sellers: At the time this complaint was

(Testimony of Vernon Murasko.)

filed, the patent had not expired, your Honor. In other words, it has expired since we filed our complaint. This case has been pending some time. It had about four or five months to run. It was 18 months. I'm sorry.

The Court: I guess that wasn't brought to my attention, because from reading the complaint and reading the prayer, I thought this was an action in which you wanted to establish the validity of the patent and in addition thereto obtain damages for infringement if the patent was valid.

Mr. Sellers: We certainly do want to establish that it was valid, your Honor. Otherwise we are not entitled to damages. But as of this time your Honor will not grant us an injunction because since we filed the complaint the patent has expired.

The Court: Well, this matter is purely within the discretion of the court. I think the court's discretion leads me to the conclusion that the motion should be denied. I think justice demands that your motion should be denied.

Mr. Sellers: Then why do we have that statute? I would respectfully point out to your Honor we have had absolutely no opportunity in this case to take advantage of the rules which ordinarily protect us when given the rights under 28 U.S.C. 282. We have had no chance to go to San Francisco [462] where this man comes from, I understand. We have had no chance to verify what he says.

The Court: If you want to check upon the veracity of this witness and check upon the jobs

(Testimony of Vernon Murasko.)

that he has designated, the time the plant was built, I am satisfied that in San Francisco you will find a building permit for this plant. I presume back in 1931 they had building permits in San Francisco. If you find there was a building permit for this plant in 1931, that would pretty nearly establish the fact. If you want to verify this information, I certainly would give you time to verify it.

Mr. Sellers: Well, in this case, your Honor, we not only have had no opportunity to verify or to bring in our own witnesses. We are given, to be sure, the right to cross-examine which, while helpful at times, is not the complete answer, as your Honor knows. Here, however, I would point out to your Honor that there was a complete lack of diligence upon the part of the——

The Court: Well, I am not defending the defendant in this case on the fact that the defendant couldn't get along with his former counsel. However, I can't penalize a party because he falls out with counsel.

Mr. Sellers: Now, your Honor, I would respectfully point out to you that that is entirely an assumption upon your part in the complete absence of any evidence. [463]

The Court: I have the affidavit of Mr. White saying he couldn't get any co-operation.

Mr. Sellers: But he didn't say he couldn't get along. He said Mr. Stromberg wouldn't come in with him. He didn't say there was a difference of feeling or personal antagonism, which has been



(Testimony of Vernon Murasko.)

suggested. There is a difference, your Honor. If the defendant merely stayed home and either for one reason or another doesn't want to prosecute the suit, he may be very friendly to his attorney, but it is a different matter from personal antagonism and the fact that he is simply not diligent. Your Honor has presumed, I have noticed, that there was a personal antagonism. There is no evidence of that. I don't believe Mr. White's affidavit supports that.

Mr. Lyon: I disagree with you. Mr. White's affidavit said that he and the defendant could not agree on how this case should be defended.

Mr. Sellers: That doesn't show any personal antagonism. I would say Mr. White couldn't agree if the defendant wouldn't come in and help prepare for the trial.

The Court: It seems to me, Mr. Sellers, if I am convinced that here was a plant that was built in San Francisco in 1931, practically the same as the plant as described in your patent, which was filed in 1937, if I am convinced that there was prior use prior to the obtaining or the filing of this patent, it would seem it would be very unjust at this [464] late date to award damages on a patent that I am convinced was illegal and void from the very beginning.

Mr. Sellers: I might point out to you, your Honor, that they had all this time to go into the evidence. This patent has been before the defendant for many months, for over a year, well over a year.

The Court: That is true.

(Testimony of Vernon Murasko.)

Mr. Sellers: I would point out to you, too, that it may be a hardship upon them. Here we have a question of the equities involved, and while the patent may in fact be invalid, I would point out to you a very high percentage of patents are adjudicated invalid and yet many people have paid royalties before that holding is made.

The Court: Many times, you know, it is like paying a traffic ticket. It is easier to pay it than it is to fight it. It doesn't take as much time and effort and money.

Mr. Sellers: You don't mind if I don't agree on the record with that?

The Court: No, you don't have to agree on the record. Maybe you fight a traffic ticket if you think you are right on the question of principle.

Mr. Sellers: I would like to say yes on that, your Honor, but my principles can't afford it.

The Court: That is exactly it. I assume a lot of patent litigation, where it is alleged to be infringed, that the [465] infringer pays off rather than to go to the expense of defending a patent case, because my understanding is patent lawyers come pretty high. It is rather expensive.

Mr. Sellers: I would say from personal experience, your information is misleading, your Honor. That is a matter of personal opinion, of course.

The Court: All right.

Mr. Sellers: Well, your Honor, I know that you have a discretion here and I know you have a right to exercise it. However, I know your Honor will

(Testimony of Vernon Murasko.)

understand if we take exception to your Honor's ruling.

The Court: I have no objection to that. Every case that I decide is subject to appeal. I have absolutely no feeling one way or the other. Attorneys have a right to question my decisions and appeal, and if the Circuit doesn't agree with me, I am perfectly willing to go along with the Circuit.

Mr. Sellers: Thank you, your Honor.

The Court: But your motion is denied.

Mr. Sellers: Thank you. No thanks, but I understand.

Mr. Lyon: Do you have any questions?

The Court: Cross-examine.

Mr. Sellers: Yes. I want to examine this [466] man.

### Cross-Examination

By Mr. Sellers:

Q. What was the name of your employer in San Francisco?      A. Which one?

Q. The one you were employed by at the time you built the plant.

A. I didn't build the plant. I was there to help install the machinery. My employer was Bode Gravel Company or otherwise designated as Bode Mix Concrete Company.

Q. Who was the head of that plant?

A. The owner, Henry Bode.

Q. How old were you at that time?      A. 28.

Q. You were 28 years old?      A. Right.

(Testimony of Vernon Murasko.)

Q. This was the first experience you had had in the field of aiding and assisting in the building of batch plants, is that correct? A. Correct.

Q. It was a brand new thing to you?

A. That's right.

Q. You had had no experience with blueprints or drawings before? A. No, I did not.

Q. You were not the engineer in charge of the job. Who [467] did have charge of the job?

A. A man by the name of Harry Davis. He was Henry J. Kaiser's son-in-law.

Q. He had direct charge of this job?

A. He had direct charge of the job, of the complete installation.

Q. And by this job, how do you identify that plant? A. Alabama plant.

Q. The Alabama Street plant?

A. That's right. Alabama, we called it.

Q. And Henry Davis had direct charge?

A. Harry Davis.

Q. How often did you see Harry Davis?

A. Sometimes he would be on the property there three or four times a week.

Q. Did he have the drawings with him when he was there? A. Yes, he did, at times.

Q. Where is Harry Davis now, if you know?

A. Dead.

Q. Who was in charge under Harry Davis in the work on that plant?

A. Various contractors. The wooden structure

(Testimony of Vernon Murasko.)

was sublet to a contractor that I don't recollect the name of.

Q. You don't remember the name?

A. No, I don't, but I do remember the name of the Scale [468] company that installed these loading hoppers, the General Pacific Scale Company at Seventh and Harrison Streets in San Francisco.

Q. The scale company installed the loading hoppers?      A. That's right.

Q. They also installed the scales, did they?

A. That's right.

Q. And they also installed the beams and levers between the hopper and the scales?      A. Yes.

Q. Did you see them do those things, sir?

A. Yes.

Q. Were you there at the plant every day?

A. Yes, at that time I was.

Q. The frame of this building was of wood. How tall was it?      A. 90 feet.

Q. What capacity was the plant?

A. Are you speaking out output?

Q. Well, if I ask you what capacity, what would you speak of, what would you tell me?

A. In my language, the capacity of the plant is how many yards of concrete per hour it can pour.

Q. All right, how many yards of concrete per hour could it pour? [469]

A. The plant was designed for 30 yards of concrete per hour. Under my supervision we built it up to 90.

(Testimony of Vernon Murasko.)

Q. I believe you said that the hoppers were connected by bolts to the ceiling, is that correct?

A. Correct.

Q. If the hoppers were connected by bolts to the ceiling, how did the hoppers move when they were filled with material to be weighed, if they were connected with bolts?

A. The bolts actually were connected to the hopper weigh beams and the hopper was connected to the weigh beams.

Q. Yes, that is what you said.

A. Cantilever effect.

Q. But I want to know if the hopper was connected to the ceiling, how was it movable?

A. The hopper was connected to the scale beams, and the scale beams were connected to the ceiling.

Q. In other words, the hopper was not connected directly to the ceiling, was it? A. Correct.

Q. I am correct? A. That's right.

Q. How close to the ceiling were the hoppers?

A. The cement scale had a clearance of about—the cement hopper had a clearance of six inches from the bottom of the cement tank that held bulk cement. The aggregate [470] hopper had a clearance of approximately three feet from the ceiling.

Q. Were these beams to which these hoppers were connected above or below that ceiling?

A. The beams constituted the floor and the ceiling, also.

Q. All right. Then the levers to which the hop-

(Testimony of Vernon Murasko.)

pers were connected, did you say they were connected to levers?

A. The rods were connected to the scale beams.

Q. The scale beams. Did you have two types of beams, floor beams and——

A. Well, shelf beams is the name they call that part of the scale.

Q. It didn't support the floor, did it?

A. No.

Q. Well, you had a ceiling above the——

A. A ceiling above the two hoppers constituted the floor of the aggregate bins above the two weighing hoppers.

Q. I see, and the ceiling or floor had its own beams, didn't it?      A. It did, yes.

Q. All right. Now, were these hoppers connected to the beams of that ceiling or connected——

A. No. They hung in an opening.

Q. Hung in an opening? [471]

A. In an opening in the floor. They did not hang. They were suspended above the opening in the floor.

Q. My question to you is the scale beams, were they positioned above or below the ceiling or floor which is above the hoppers?

A. The scale beams were positioned above the floor of the batching hopper room, but they were positioned horizontal to the cement hopper and the aggregate hopper, and the beams of that scale were connected to the ceiling by bolts.

The Court: Mr. Sellers, I wonder if I could in-

(Testimony of Vernon Murasko.)

interrupt just a minute. I have got something on my mind I want to get straightened out if I can before the morning recess.

Mr. Sellers: Yes, your Honor.

The Court: What is the date of the patent? Is it the date when it is filed?

Mr. Sellers: When it is issued, your Honor, when it is granted or issued.

The Court: When was this issued?

Mr. Sellers: It is in the upper left-hand corner there, your Honor.

The Court: In the patent?

Mr. Sellers: Yes, in the drawing.

The Court: Oh, I see. November, 1938?

Mr. Lyon: That is correct, your Honor. The filing date was February 10, 1937. [472]

The Court: I saw the filing date.

Mr. Sellers: But November 29, 1938, was the date it was granted.

The Court: Then it would expire November 29, 1955.

Mr. Sellers: Expired November 29, 1955.

The Court: I have been misled by the pleadings in this case and also by the pretrial memorandum.

Mr. Sellers: I am terrifically sorry. There was no intention of doing that, I assure you.

The Court: I have been misled, I don't say there was any intention, by your pretrial memorandum. Of course, it was filed in July.

Mr. Sellers: At that time the patent had not expired.



(Testimony of Vernon Murasko.)

The Court: At that time the patent had not expired. Now, the defendant filed a pretrial memorandum.

Mr. Sellers: He filed his just about a week ago.

The Court: That's right, on March 7th.

Mr. Sellers: Of this year.

The Court: Yes, March 7th of this year. The defendant doesn't say anything about that the only issue is the question of damage. Not only that, the defendant says the only issues presented in this action are the questions of the validity of claims 1 and 5.

Mr. Sellers: Well, your Honor——

The Court: Then you filed a reply on March 12, and you [473] don't tell me in your reply of March 12 that the patent has expired and the only thing you are asking for is damages.

Mr. Sellers: Your Honor, had I thought that was important to you, we would certainly have said it, but frankly our reply brief was directed only to the points raised in the brief of the defendant. I don't see at this time just why that concerns your Honor.

The Court: Maybe I made a mistake in not allowing you to make an opening statement. Maybe in your opening statement you would have told me that the patent had expired.

Mr. Sellers: Very willingly, your Honor, because the only difference, as I see it, is whether or not you would grant an injunction. The question of validity is still in issue, and it is in issue whether

(Testimony of Vernon Murasko.)

the patent has expired or not. The only difference is whether or not, having expired, we would no longer ask for an injunction, but that is not really at issue. I don't see that we have misled you upon any material point.

The Court: I am not saying that you have misled me deliberately or intentionally. I am saying that I have been misled because as a general rule before I start the trial of a case I read the pretrial memorandums.

Mr. Sellers: Yes.

The Court: And try to read the cases to determine what the issues are, and when I come out here and say that I have [474] read your memorandum and know what the issues are, I am relying on what is in the file, not on something that happened outside the file.

Mr. Sellers: Nothing has happened outside the file.

The Court: Except that the patent has expired.

Mr. Sellers: There is nothing we could do about that. Our pretrial brief was filed a year ago, last July, and we almost went to trial then, and then the trial coming off now at this time, we didn't file another pretrial memorandum, but opposing counsel did, so his was nearer up to date than ours, and in our reply brief, we only covered the points he mentioned. But I state to you honestly that I don't think the fact that the patent has expired would change the procedure one iota. I don't see why it should.

The Court: Mr. Lyon, when you filed your pre-

(Testimony of Vernon Murasko.)

trial memorandum, did you know the only issue was the question of damage?

Mr. Lyon: Yes, I did. I did not realize that the court was laboring under the apprehension that the patent was still in force.

The Court: I didn't pay much attention to the date of the patent. I assumed that the patent was in force and here was the customary patent litigation in which you are trying to establish the validity of a patent.

Mr. Lyon: I agree with Mr. Sellers in that respect [475] insofar as the validity of the patent is concerned. I don't think the relief that is potentially available has anything to do with it. Possibly it does. The court will make up his own mind there. I should have called your attention to that, but I didn't do it. Frankly, I took a look at it and I didn't realize the court wouldn't see the same thing.

The Court: Well, I don't know if it makes any particular difference as far as the case is concerned, or the outcome of the case, but I do like to keep my eye on the goal we are trying to reach.

Mr. Sellers: But don't you see, your Honor, whether or not you would grant us an injunction, assuming our patent was still alive, would depend on whether or not we asked for it. We might try this case exactly the same way with the patent unexpired and you would give us damages, and if we asked for an injunction, possibly you would give that to us, too.

The Court: But the only thing I have before me

(Testimony of Vernon Murasko.)

is the prayer of the complaint in which you ask for a preliminary and final injunction.

Mr. Sellers: Well, at that time we were entitled to it, but due to the delay, we can no longer get it. I am sorry I didn't cancel that prayer, your Honor, but I don't think that the trial of this case would have varied one iota from what it has.

The Court: I don't think it would, either. I guess I [476] have learned something. Hereafter I better take a look at the expiration date.

Mr. Sellers: I do apologize, your Honor. I think probably Mr. Lyon or I, incidentally, would probably have mentioned the patent had expired, although I am not sure, because I didn't attach much importance to it.

Mr. Lyon: That is going to be my first remark in the concluding argument.

Mr. Sellers: I knew you were going to make a good speech.

The Court: Well, I wanted to be sure. I am not saying that this—what I am trying to say is this is a natural mistake that could happen in any litigation and I don't want anyone to think from what I have said that I am criticizing either attorney or the litigants because I think the court is as much at fault as anybody else.

Mr. Sellers: I am very sorry.

The Court: I think the court is more at fault than anyone else, because I should have allowed you to make an opening statement, but I assumed all the issues had been presented and all the material

(Testimony of Vernon Murasko.)

facts and issues had been presented in the allegations of the complaint and the pretrial memorandum, and all that we are trying to do here is to present the evidence to sustain the allegations.

Mr. Sellers: But, your Honor, I do repeat, because I am [477] afraid you don't quite see the picture on this point, that is, you still have to sustain the validity, whether it has expired or not. How can you award damages if you don't sustain the validity?

The Court: Well, I will have to sustain the validity up to the date of expiration.

Mr. Sellers: That is true, your Honor, but the testimony here all goes back years before that. What happened since the expiration doesn't get into this picture.

The Court: Well, we will take our morning recess now. We will recess until 10 minutes after 11:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Sellers): Is that the first plant that you had ever seen of the type having the cement hopper in the center between the portions of the aggregate hopper? A. It was not.

Q. You had seen plants like that even earlier?

A. I had, in 1930.

Q. Where had you seen that?

A. In San Francisco. The plant was located at Geneva Avenue and Tara Street.

(Testimony of Vernon Murasko.)

Q. By whom was that plant owned?

A. By the same company, Bode Gravel Company or Bode Ready-Mix Concrete. [478]

Q. They had two plants, I take it, of the same type, after they built this one?

A. Two plants that accomplished the same purpose, constructed a little differently.

Q. Did the same manufacturer or builder build both plants?

A. The wooden structure was built by the company that owned the Bode Gravel Company. The cement hopper and aggregate hopper were built by the Western Pipe & Steel Company of South San Francisco.

Q. When were you first contacted in this matter? By whom? A. In what way?

Q. I want to know who made contact with you to come here to testify in this case?

A. Mr. Stromberg of the California Batching Company.

Q. How long have you known Mr. Stromberg?

A. Oh, I have known him probably for three years, probably have met him three times in three years.

Q. You are engaged in business at the present time here in Southern California?

A. That's right. I am not in business. I am working for the Western Concrete Company.

Q. Do you have business contacts with Mr. Stromberg? A. No, I don't. [479]

Q. Social contacts? A. No, I don't.

(Testimony of Vernon Murasko.)

Q. How did Mr. Stromberg happen to know you had contact with this type of plant?

A. Well, he is a competitor of the company that builds plants, fabricates them for the Western Concrete Company, and he is in there looking for business and speaking to responsible people working there that may help him.

Q. Did he ask you if you ever knew of a plant like that some time ago?           A. No, he didn't.

Q. How did you happen to tell him?

A. Well, that would entail a story. I can't give you an answer on that.

Q. Well, can you make the story short?

A. Mr. Stromberg contacted a man who used to work for me from 1934 to 1942, when I left San Francisco, that operated this plant after I had left, and probably for six years before I had left there. He was called down here for a witness for Mr. Stromberg and happened to mention my name. It happened Mr. Stromberg happened to know me. I have not seen this gentleman in particular for three years. I have seen him twice since 1942.

Q. What was his name?

A. Ed Cornett. [480]

Q. Where is he now?

A. Present in this room.

Mr. Lyon: He will be our next witness.

Mr. Sellers: Thank you.

Q. This plant was operated by you for what period of time?

A. 1931 until I left in 1942, May.

(Testimony of Vernon Murasko.)

Q. Did it operate satisfactorily during that entire time?      A. Very satisfactorily.

Q. You rather prefer the type of plant having the central cement between the aggregates?

A. Not necessarily, personally.

Mr. Sellers: That's all, your Honor. Your Honor, may I at this time say that in making my motion to strike, I said 28 U.S.C. 282, rather than 25 U.S.C. May I correct that?

The Court: It may be corrected.

Mr. Sellers: Thank you.

Mr. Lyon: That's all.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Lyon: Mr. Cornett.

Your Honor, I didn't get this marked and put in [481] evidence. Can I recall the witness?

The Court: No, you don't have to do that.

Mr. Lyon: He has already identified it. May I have this marked next in order?

The Court: It may be marked.

The Clerk: For identification?

The Court: No, in evidence.

The Clerk: Exhibit E.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit E.)

Mr. Sellers: I wish to object to that, your Honor, as being part of the record of the testimony of a witness who should not have testified in our opinion.



The Court: Overruled.

Mr. Sellers: I would also like to object to it upon the further ground that—no, I cancel that.

E. F. CORNETT

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: E. F. Cornett.

The Clerk: Will you spell your last name?

The Witness: C-o-r-n-e-t-t. [482]

Direct Examination

By Mr. Lyon:

Q. What is your age, Mr. Cornett? A. 53.

Q. What is your present occupation?

A. I am working for M & K Corporation on a skiploader.

Q. Where is that organization located?

A. In San Francisco.

Q. Who was your employer in 1929?

A. In 1929 I was working in the foundry business.

Q. And in 1930?

A. 1930, the latter part of 1930, I went to work for Bode Gravel Company.

Q. How long did you work for the Bode Gravel Company?

A. Well, I worked there for approximately a year, and we were off during the depression. I come back in the latter part of 1932.

(Testimony of E. F. Cornett.)

Q. What did you do in 1932? What were your duties?

A. I was driving a truck for a while.

Q. How long did you drive a truck, sir?

A. Approximately two years all told.

Q. At the conclusion of your truck driving, what duties did you then undertake?

A. I was broken in as plant operator.

Q. At what plant, sir? [483]

A. The Alabama Street plant.

Q. What year was this? A. 1933.

Q. 1933. How do you fix that year, sir?

A. Well, I know the year. I couldn't give you the exact month or date, but I know the year I went into the plant.

The Court: How do you know it?

Q. (By Mr. Lyon): How do you fix it as 1933?

A. Because I absolutely know it.

Q. Was there any construction work or anything of that type going on around the area which would help fix your memory on that?

A. I think I could recall the Federal Building about that time being built.

Q. The plant that you were operating in 1933, that was this Alabama Street plant?

A. That is correct.

Q. How much of your time was spent operating that plant? A. 1933 to 1947.

Q. Continually? A. Yes, sir.

Q. Did you have other duties besides the operation of this plant? [484] A. No, sir.

(Testimony of E. F. Cornett.)

Q. That's all you did do, was operate the plant?

A. That's right, a plant operator.

Q. How was the Alabama plant constructed with reference to its aggregate hopper and its cement hopper?

A. We had a large aggregate hopper and we had a center cone with a cement scale inside the center cone to protect the cement scale.

Q. What weighing mechanisms were used?

A. You mean the scales?

Q. Yes. A. We had cumulative weights.

Q. Did you have more than one?

A. We had a cement scale plus the aggregate scale.

Q. You had one scale attached to the cement hopper and a second scale attached to the aggregate hopper? A. Yes.

Q. Was the cement hopper positioned physically within the aggregate hopper? A. Definitely.

Q. I show you Defendant's Exhibit E, which is a sketch made by Mr. Murasko, and ask you if in accordance with your recollection that is an accurate sketch of the Alabama plant?

A. It is about as accurate as you could make it.

Q. Would you have any changes or corrections you would [485] like to make to that?

A. No, I wouldn't, because it is exactly as he drew it. I know it very well from memory because I have done plenty of repair work on it.

Q. Have you ever helped reconstruct this plant?

A. Just repair work.

(Testimony of E. F. Cornett.)

Q. What do you mean by repair work?

A. If something would wear out or something would go wrong.

Q. Did the cement hopper, for example, ever need replacement?

A. No. We never had to replace the cement hopper. We repaired the lower gates, slide gates, several times.

Q. The gates at the bottom of the hopper?

A. Yes. It would wear a little bit and that would be a replacement there.

Q. Would you do that replacement yourself?

A. We would generally have a welder in and I would assist him.

Q. So you have watched him actually get down in there and put the gate on the bottom of this cement hopper?

A. Right.

Q. Would you describe for me the operation of the Alabama Street plant during the charging and the batching of cement? [486]

A. Of cement?

Q. Of concrete. Pardon me. Using this drawing as a basis for illustration.

A. Well, we would weigh up our water.

Q. Where would you weigh that water?

A. We had a regular water valve there and we would weigh it on the aggregate scale.

Q. Yes, but whereabouts on this drawing, what element?

A. It would be right over in here.

Q. At G?

A. He hasn't got the way the valves are fixed.

(Testimony of E. F. Cornett.)

Mr. Sellers: I suggest he let the witness answer the question.

Mr. Lyon: He has been pointing at it and all I am doing is get him to——

The Witness: It is right here.

Q. (By Mr. Lyon): How is that designated on the drawing, what letter? A. G.

Q. After you have poured the water in there and weighed it, what is the next step?

A. You hit your cement button and you would start weighing aggregate.

Q. Just a moment. We don't know as much about these plants as you do, so if you can describe it in language that [487] we can understand, it will help.

A. You push your cement button and your cement would start being weighed.

Q. Where is your cement beforehand?

A. It is up in the tank above the center hopper.

Q. Is that on this drawing?

A. Right there.

Q. That is designated what? A. H.

Q. So you would open the hopper H and permit your cement to flow? A. Yes.

Q. And it would flow down where?

A. Into the cement scale.

Q. The cement hopper? A. Yes.

Q. And that is designated on this drawing what?

A. B.

Q. That is the gate. A. D.

Q. Now, at the same time or at a different time.

(Testimony of E. F. Cornett.)

would you empty aggregate into the aggregate hopper?

A. At the same time the cement was being weighed, you could also weigh your aggregate.

Q. Each one of these hoppers weighed independently of [488] the other? A. Yes, sir.

Q. They were suspended from their own separate scales? A. That is correct.

Q. When you had the appropriate amount of cement in the cement hopper and the appropriate amount of aggregate in the aggregate hopper, then what would you do?

A. You would throw your water valve, let your water start running in the mixer, and naturally your mixer is turning over, and then you would open your aggregate gate, and as soon as your aggregate started flowing, you would open the cement gate and the cement would go down the chute into the mixer.

Q. Now, during the discharge of the mechanism, what was the disposition of the cement with respect to the aggregate, if you understand what I mean?

A. It flowed right down with the aggregate.

Q. Flowed in the middle of it?

A. Right about the middle of it.

Q. So that the shaft of cement that was discharged was surrounded completely with aggregate?

A. That's right, at the bottom of this hopper you would have a big V chute that went down into the mixer. It was wide at the top and narrowed down, and the cement would hit it about three-

(Testimony of E. F. Cornett.)

quarters of the way up and go right in with [489] the aggregate.

Q. And this was the condition in which the plant was operating in 1933 when you assumed it?

A. That's right.

Q. It has operated in that fashion until when?

A. Until 1947.

Q. What happened in 1947 to the plant?

A. It started to disintegrate and they decided not to rebuild. They made other arrangements for procuring their cement, so they just naturally tore it down.

Q. You have no idea where the remnants of this plant are at the present time?

A. They went to the junk yard as scrap.

Q. Were you familiar with any other plants similar to this prior to 1937?

A. Yes. We had a plant at Geneva and Tara.

Q. Was that constructed in the same manner as this?

A. A little differently.

Q. How was this constructed differently?

A. Your cement scale, instead of being right in the center, was more or less to the side, but it was inside the aggregate hopper. Don't ask me to make a drawing. I can't draw.

Q. Can you do this well?

A. I don't know. [490]

Q. Can you try? Give me an outline.

A. We had a hopper like this, see, and then your cement scale was just anchored inside like

(Testimony of E. F. Cornett.)

this, and you had a gate here and you proceeded with the same operation identically.

Q. It operated in the same way?

A. Yes. The only thing is your cement scale was off to one side, and instead of being a cone shape, it was more or less a box shape. It come down in a V to empty out, you know. It was a scale within a scale like this one.

Q. Or a hopper within a hopper, rather?

A. Or a hopper within a hopper.

Q. The scales are outside the aggregate hopper?

A. No. In both plants the scale was inside the aggregate hopper.

Q. The cement scale was inside?

A. The cement hopper was inside the aggregate hopper.

Q. I am talking about the scales.

A. Oh, the scales. They would be outside and you would be standing alongside your bank of valves facing the scales.

Q. And from one scale the cement hopper was suspended and from the other scale the aggregate hopper was suspended?

A. That's right.

Mr. Lyon: That's all. [491]

### Cross-Examination

By Mr. Sellers:

Q. You worked in this one plant from 1933 to 1947?

A. That's right.

Q. Did you ever take any pictures of it?

A. I had no reason to take any pictures.



(Testimony of E. F. Cornett.)

Q. No reason to take pictures. Have you worked in any other plant since that time?

A. No. I got out when they tore down the plant, I got out of the cement business and went in outside construction.

Q. Isn't it a fact that while you were there you were working with or under the preceding witness?

A. That is correct. He was my superintendent.

Q. Did that plant work satisfactorily?

A. Very much so.

Q. You fixed the date at 1933?

A. That is correct, when I started to operate.

Q. When you started to operate. How did you fix 1933? Couldn't it just as well have been 1934 or 1935?

A. No, because there is no way for me to explain or tell you, but I absolutely know it was 1933.

Q. Well, what else do you know happened in that particular year?

A. That was the start of the Federal Building, wasn't it, in 1933, in San Francisco? [492]

Q. I don't know. What other buildings started that year?

A. I don't remember. I was just the mixer man upstairs and I had nothing to do with any other part of the business. They would call for a mix and I would mix it up, and that's all I know.

Q. Well, you were putting out cement or concrete, but when was this? In other words, how do you know that it was 1933, or maybe it was 1930? How can you be sure it wasn't in 1930?

(Testimony of E. F. Cornett.)

A. Because it wasn't. The plant wasn't built in 1930.

Q. When was it built? A. 1931.

Q. How do you know that?

A. I was driving a truck.

Q. What is there about 1931 in particular that you can fix in your memory?

A. I knew they were building this plant, but I had nothing to do with it.

Q. You were driving a truck in 1930, weren't you? A. Part of it.

Q. In 1929?

A. 1929, I was in the foundry business.

Q. What were you doing in 1932?

A. I worked part of that year with the Bode Gravel Company, [493] and I went with the U. S. Engineering Department for six months, because things were pretty tough, and I had an opportunity to go with the U. S. Engineers Department on the dredge McKenzie.

Q. Where was that located?

A. In San Francisco being repaired. We went up to Aberdeen, Washington, to dredge.

Q. You know that happened in 1933?

A. No. 1932.

Q. Could it have happened in 1933?

A. When I come back off the dredge, that is one reason I can say it was 1933. I was gone six months and I came back and worked for Bode.

Q. You were gone six months?

A. That's right.

(Testimony of E. F. Cornett.)

Q. How do you know that that six months you were on the dredge was in 1933? A. 1932.

Q. I beg your pardon.

A. 1932. Because I have a discharge to prove it, but I don't have it with me.

Q. Do you have anything else that might be used to prove it was in 1932 that you were on the dredge? A. My discharge will prove it.

Q. Anything else? [494]

A. Oh, if you would get hold of the first assistant engineer on the dredge McKenzie, he would verify it.

Q. In addition to that, is there anything else that would tend to fix 1933 in your mind as the time when the plant was built?

A. When the plant was built?

Q. Yes.

A. I was driving a truck when the plant was being built in 1931.

Q. I beg your pardon. You went to work at the plant?

A. I went to work at the plant as the mixer man, as an operator, in 1933.

Q. Anything else to fix that date?

A. I just come in off that dredge and went back to work for Bode Gravel.

Q. Anything else? A. That's all.

Q. You have nothing to establish the date on which you were on the dredge other than the discharge, which you don't have with you?

(Testimony of E. F. Cornett.)

A. No.

Q. What were you doing in the year 1934?

A. I was operating the mixer.

Q. What were you doing in addition to operating the mixer there? Did you have any other activities? Did you [495] go anywhere, take any trip?

A. Not that I recall.

Q. How about 1935? When was the World's Fair in San Francisco? Didn't they have a fair about that time? A. 1939.

Q. Did you go anywhere in 1936?

A. Yes. I took a month off and I went to British Columbia.

Q. In 1936? A. That's right.

Q. How do you fix that as 1936 and not 1935?

A. Because I know it was 1936. I didn't keep my steamship tickets to prove it, but I know it was 1936.

Q. And in 1937 where were you?

A. I was working for Bode Gravel.

Q. What did you do in addition to working for them? A. Nothing.

Q. Did you take any trips that year?

A. No, sir.

Q. Are you sure that the trip you took couldn't have been in 1937 and not in 1936?

A. It was in 1936 when I made the trip to British Columbia.

Q. You believe you remember that, but what can you tie it up with that we know happened? [496]

A. I took a month off and took a trip.

Q. While you were on that trip, did anything

(Testimony of E. F. Cornett.)

happen that the public in general would know or that you could verify?

A. You could verify it by the then mayor of Vancouver, who was my uncle.

Q. Well, what happened to the mayor of Vancouver at that time, what happened?

A. He entertained us.

Q. He detained you?

A. He entertained us.

Q. Oh, entertained you. Was that Vancouver, British Columbia? A. B. C.

Mr. Sellers: Well, I don't know, your Honor, whether that makes that a public record.

Q. Outside of these trips which you took, which you simply remember the date you took them, you have nothing else to pinpoint the time you went to work at this plant? A. That's right.

Q. Prior to the time you went to work there, you had never seen the interior of the plant, you didn't know how it was made? A. No.

Q. Your knowledge of its construction came beginning in [497] 1933? A. That is correct.

Q. And you were there from 1933 to 1947. That was a long time, wasn't it?

A. That is correct.

Q. That would be a total of 14 years.

A. Right.

Q. Did you ever figure up it was 14 years?

A. Did I ever figure it up?

Q. Yes, did you ever stop to figure you worked on that one job for 14 years?

(Testimony of E. F. Cornett.)

A. That's easy to figure. There is no point in trying to remember it. The main thing is I was getting paid.

Q. Well, I appreciate that, but I mean had you ever said to anyone yesterday or the day before, "I was with that company 14 years when I left"? Had that 14 year figure ever stood out in your mind?

A. Oh, yes, but I don't remember bragging about it.

Q. Who did you ever tell you were with the company for 14 years?

A. I don't remember telling anyone especially. Mr. Murasko can verify it.

Q. When did Mr. Murasko leave that plant?

A. I think it was 1942.

Q. He left in 1942? [498]

A. I think that was the date.

Q. So during what period of time would you have been working with Mr. Murasko?

A. Well, from 1933 on as plant operator, until he left the company.

Q. Between the years 1933 and 1942, you and he were at the same plant? A. Yes.

Q. You are familiar with the gate at the bottom of the hoppers in that plant, were you?

A. Yes, sir.

Q. Now, referring particularly to the aggregate hopper, what kind of gate construction did you have there? A. A knife type gate.

Q. A knife type gate?

A. Sliding gate, flat sliding gate.

(Testimony of E. F. Cornett.)

Q. It was a gate that slid horizontally from one side to the other?

A. Just worked back and forth on an air ram.

Q. Was there more than one gate in the bottom of the aggregate hopper?      A. No, sir.

Q. Just one gate?      A. That's all.

Q. Did it cover the entire bottom of the aggregate hopper? [499]      A. No, sir.

Q. Just one gate?      A. That's all.

Q. Did it cover the entire bottom of the aggregate hopper?      A. Yes, sir.

Q. How many gates did you have on the cement hopper?      A. One.

Q. That was positioned above the position of the aggregate hopper gate?

A. That's right.

Q. Centrally of it?      A. That's right.

Q. I believe you said, Mr. Cornett, that the cement would hit the aggregate three-quarters of the way up, were those your words?

A. I beg your pardon?

Q. Did you say that the cement would hit the aggregate three-quarters of the way up?

A. Approximately three-quarters of the way up from this back chute as it would be entering the mixer.

Q. What did you mean by that?

A. Well, you had a chute under this scale hopper going into the mixer, and naturally you wouldn't have it right at the bitter edge. You would want a

(Testimony of E. F. Cornett.)

little leeway for spillage, [500] so it would hit approximately three-quarters of the way.

Q. Well, wait. Didn't the aggregate—how wide, looking at this drawing that you have before you here, Defendants' Exhibit E, do you remember how wide was this hopper from one side to the other? I am referring to the aggregate hopper.

A. Offhand, I don't remember. It was quite a good sized hopper, but I never took the trouble to measure it.

Q. Was it five feet wide?

A. It was more than that.

Q. Was it 10 feet wide?

A. Approximately eight.

Q. Approximately eight feet wide?

A. I would say approximately eight feet wide.

Q. If it was eight feet wide, how wide was it in the other dimension? A. The same thing.

Q. It was a square hopper?

A. A square hopper.

Q. About eight feet on each side?

A. Right.

Q. Now, how big was the gate at the bottom of the hopper, the discharge outlet?

A. I knew I measured it lots of times, but I don't remember offhand the exact measurements of it.

Q. You measured it a lot of times? [501]

A. Oh, yes. We had to replace it when it would wear, but offhand I don't remember the measurements.



(Testimony of E. F. Cornett.)

Q. You had baffles inside of your outside aggregate hopper, according to this drawing?

A. Right.

Q. And they extended down almost to the sliding gate, did they not?

A. Yes, somewhere along in that spot there, so that the aggregate could by-pass.

Q. You mean as shown here they extend too far?

A. No.

Q. They extended down just about as far as in this drawing?

A. That is correct.

Q. Now, did you have any chance for the aggregate to collect in the bottom of this hopper above the gate? Did that happen?

A. You mean the aggregates collected at the cement gate?

Q. No, collecting above the aggregate gate and below the cement gate, did that happen in your construction?

A. Oh, yes.

Q. In other words, you formed a body of aggregate across above the gate?

A. That's right. [502]

Q. Is that the way it worked?

A. Yes.

Q. And then when this was discharging, about how wide, if you remember, were the actual passages through which the aggregate went down?

A. The bottom was about a foot and a half.

Q. A foot and a half wide on each side of the cement hopper?

A. That's right.

Q. Did you ever notice whether or not the aggregate in discharging down from the aggregate

(Testimony of E. F. Cornett.)

hopper from the two sides would actually come together to form a solid stream of aggregate? Did you ever notice that?

A. Oh, yes. It would come out as a solid stream.

Q. Where did you stand when you saw that?

A. I have been there—I have been relieved lots of times and lots of times we would have to go right through lunch on certain jobs and I could stand and watch the operation on my relief.

Q. Was the fall of the aggregate in the cement in a position exposed so you could see it from the outside? A. Yes.

Q. All you saw from the outside was the falling aggregate. You didn't know whether it was extending clear across or not, did you? [503]

A. Sure.

Q. How did you know?

A. Because I had eyes.

Q. But if you are looking at a wall of aggregate falling, can you be sure that that wall is solid for one foot or for four feet?

A. Solid for the full width of that hopper.

Q. How did you know that?

A. Because I observed it.

Q. You observed it as it was falling, but you were at the side of the aggregate fall, weren't you?

A. I was behind it.

Q. You were behind it? A. That's right.

Q. You were off to one side?

A. I was right behind it as it went straight down.

(Testimony of E. F. Cornett.)

Q. Behind it, off at one side about on the same horizontal level?

A. I was standing on the platform there and you could see it go down very plainly.

Q. Well, what I want to learn is whether or not the cement falling out from your cement hopper fell into the streams of aggregate falling from the aggregate hopper?

A. No, it did not.

Q. It did not? [504]

A. It went directly into the mixer.

Q. The cement fell down between the streams of aggregate into the mixer?

A. That is correct.

Q. How far was it between the stream of aggregate and the stream of cement then?

A. What do you mean, how far?

Q. What was the distance? Was it one foot or two feet or three feet or what was the distance?

A. They came out together.

Q. Oh, I beg your pardon.

A. The cement fell right down in here and came out with the aggregate.

Q. They came out together, but you have said now that the stream of aggregate upon the two sides of the cement were spaced from the stream of cement and that it came down between the two streams by itself.

A. You would open this aggregate gate first, leaving a void for the cement to come through on.

(Testimony of E. F. Cornett.)

Q. All right. Now, my question is, we have two streams of aggregate coming down from these two sides? A. That's right.

Q. All right. Now, we have two streams of aggregate coming down like this, and then spaced in between the streams of aggregate we have a stream of cement, is that correct? [505]

A. No. The aggregate would come down and spread out in this chute and your cement fell directly on the aggregate.

Q. As I understand what you just said, the aggregate comes out the bottom of this side over here and falls down, and the aggregate comes down the bottom of this side over here and falls down, and the cement falls down between the two, but the cement, you have said, does not fall into the aggregate, it falls down between the two, is that right?

A. You open this gate first and your aggregate comes out and spreads into the back chute, and then you open your cement gate and the back chute is full of aggregate and the cement goes right down into it.

Q. All right. When it gets down there into the back chute, or whatever it hits down here, they all fall together? A. Yes.

Q. I am referring to right here, before they hit anything, without falling down here, they haven't hit anything yet, the aggregate is falling down on both sides and the cement is falling down in the

(Testimony of E. F. Cornett.)

center. Now, my question is whether or not the cement falls or strikes the aggregate or whether, as you have said before, you don't have two streams of aggregate with the cement positioned in between the two.

A. As I have explained, your aggregate is spread out on the chute.

Q. No, no. [506]

A. Your aggregate is spread out on this back chute and the cement follows right through with it, to make a——

Mr. Lyon: Your Honor, may we have one counsel interrogating the witness instead of two?

The Court: I assume that is proper.

Mr. Sellers: May I talk to counsel, your Honor?

The Court: Yes.

Mr. Sellers: I don't believe he has been asking any questions.

Mr. Lyon: No, but I think his presence might make the witness uneasy.

Mr. Sellers: Thank you.

Q. We have four compartments. It has been described that the aggregate compartment, aggregate hopper, is comprised of four separate compartments, is that correct?

A. Yes, with fins in there for the reinforcement.

Q. Four aggregate hoppers. As a matter of fact, then, these walls that divided these four hoppers were down here at the side. This is one of the walls we see right here. That means if there was aggregate in this one side over here and you discharged—

(Testimony of E. F. Cornett.)

well, let me ask you. Did you always discharge these four hoppers simultaneously? A. Yes.

Q. All four aggregate hoppers simultaneously?

A. Yes, sir. [507]

Q. Why did you discharge them at one time?

A. Because they all went in at one time. You might put in one size at one time and put in another size at another time, and one size at another, and they all go to make the concrete.

Q. I see. Where did you have your sand here, in which hopper? A. Right here.

Q. The hopper over in the corner, this hopper?

A. No. That diagram is the top view of the hopper.

Q. All right. This is the top view of the hopper. I am looking at the top view of the hopper. What is in the hopper that I am looking at the top view of right here, this hopper?

A. That is where the aggregate is, your rock, sand——

Q. What is in this section over here?

A. That is rock or sand, either one.

Q. Wouldn't you put sand in one and rock in the other? A. That's right.

Q. Then we could put sand here and rock here and sand here and gravel here, is that the idea?

A. Yes.

Q. And cement in the center?

A. That's right.

Q. Do I understand that these all came down and rested [508] upon the single gate here at the bot-

(Testimony of E. F. Cornett.)

tom, is that correct? A. That is correct.

Q. Then when you would open that gate, it would all go down together?

A. That's right.

Q. I have a pencil here with red, if I may add to Mr. Lyon's Exhibit E. Would you please, with this red pencil, make a mark down wherever you believe the cement would strike the aggregate. You have said the cement would fall into the aggregate. Where would that be?

A. Right in the center, coming right down through the center.

Q. It comes down through the center. Is the aggregate over in the center, too? A. Yes, sir.

Q. Or didn't you say the aggregate fell down the stream here, and the stream over here, with the cement in between?

A. They spread out in a chute and there is one wide pattern.

Q. Well, wait a minute. This is right below the gate, isn't it? Isn't the chute you are talking about a chute spaced down below a ways?

A. Yes.

Q. Let's not go down to that chute. Let's stay at the gate. [509]

A. The chute is far enough that it takes the fall and spreads.

Q. Let me see whether or not this would help any. Here is the outside hopper and here is the cement hopper, let us say. Isn't it a fact that you

(Testimony of E. F. Cornett.)

have down below here a hopper in which this falls, a chute which goes something like this, and the gravel and rock and the cement fall down into this chute and this is where they mix, is that correct?

A. That is where they come to the mixer.

Q. Yes. This is where they first strike. In your construction, did they strike up here at the top? Did they intermingle or mix right here at the gate?

A. Not until the chute.

Q. Not until they hit way down here?

A. Yes.

Q. So in the construction of your plant, the actual mixing of the cement and the aggregate took place at a point I am going to mark X on this drawing I have just made, is that correct?

A. That's right.

Q. Now, how steep was the slope of these side walls here? I am going to mark the outside walls of the aggregate hopper Y.

A. Offhand, I don't remember.

Q. Well, you remember everything else about this, why [510] don't you remember that?

A. I don't remember the pitch of them. They were pitched, but I don't know exactly the pitch.

Q. But stop and think about it now.

A. I can't answer the question.

Q. You just don't know how steep they were?

A. That's right.

Q. And the cement was in the center, so let's assume the outside walls of this aggregate hopper are just about as I have shown them in this drawing. Is



(Testimony of E. F. Cornett.)

that about right?           A. Not quite right.

Q. How would you like to change it?

A. They are more like this. They come down and they curve in here.

Q. About what pitch do you say they would be? If you didn't have the drawing in front of you, what pitch would you say they should be?

A. I don't know what the pitch is.

Q. Can you indicate on my drawing here how they should be arranged, what angle?

A. That is not a drawing of it at all.

Q. Not even a diagrammatic showing?

A. No.

Q. We will make it a little more complete. We will put a gate down here at the bottom. Here is your gate, which I [511] will label G, and we will put a gate here at the bottom of the cement hopper, which I will label H, and we will label the interior cement hopper J. Now, do you recognize that as being—well, I will run these baffles a little bit further. Do you recognize that as being something which would be considered an aggregate hopper on the outside here and a cement hopper J on the inside there?

A. It is not designed like that drawing.

Q. It is not designed like that?

A. Not the aggregate hopper.

Q. How would you like to change it?

A. (Indicating.)

Q. You have marked another line. The line you have just put on I will mark K and run two lines

(Testimony of E. F. Cornett.)

up to the reference character K to indicate two lines. Well, do I understand that the bottom of the aggregate hopper then extended almost flat across to the gate?

A. No. I got it a little bit too much. It would come down on an angle.

Q. On an angle.

A. To freely empty the hopper.

Q. To freely empty the hopper, but you have stated that the—you have stated both ways, I believe—no, you have been consistent. You have said that the cement coming out of the cement hopper would not mix with the aggregate coming out [512] of the aggregate hopper until they strike at the point X down here, is that correct?

A. Correct.

Q. So that up here in the hopper itself, at the discharge of the, shall we say, the hoppers, there is no mixing action takes place up there? Is it not also a fact that in the operation of this unit you would frequently discharge the aggregate into the weighing receptacle down here, which I shall call L, and put that reference character on it—is it not a fact that you would frequently discharge the aggregate down into L, and then after it has reached down to L, then discharge the cement on it?

A. Always did that.

Q. That is the way you always did it. Why did you always do it that way?

A. So that your cement wouldn't stick up on this chute here. You would have a flow of cement

(Testimony of E. F. Cornett.)

on your aggregates. You always open the aggregate gate first.

Q. Let your aggregate out, and then you let the aggregate collect at the chute at the bottom?

A. Yes.

Q. After it had all fallen out, then you——

A. Not all.

Q. How much?           A. Very little. [513]

Q. How much?

A. Oh, it would be—say if you are batching two and a half yards, maybe let a quarter yard go down before you tip your cement gate, just enough to cover it so that the cement would stick to it.

Q. In other words, you partially discharge your aggregate hopper up here and then having partially discharged it, thereafter you open the cement, and do I understand you to say that you didn't completely discharge the aggregate before you discharge your cement?           A. That's right.

Q. You don't want to say that now?

A. No, a small portion of it.

Q. A small portion of it, and therefore as far as the latter portion is concerned, the two of them went down together?

A. That is correct.

Q. But the fact was that the cement was spaced between the lines of flow of the aggregate and the mixing action took place down in the collector hopper or the chute down below?

A. That's right.

Mr. Sellers: I would like to mark this drawing

(Testimony of E. F. Cornett.)

that I have made rather crudely as Plaintiff's Exhibit No. 20.

The Court: It may be marked.

The Clerk: Plaintiff's Exhibit 20 for identification. [514]

(The drawing referred to was marked as Plaintiff's Exhibit No. 20 for identification.)

Mr. Sellers: Now I would like to offer it in evidence.

The Court: It may be received in evidence.

The Clerk: No. 20 in evidence.

(The drawing referred to was received in evidence as Plaintiff's Exhibit No. 20.)

Mr. Sellers: I wonder, your Honor, if we may have the recess now.

The Court: All right.

Mr. Sellers: Thank you, your Honor.

The Court: Court will stand in recess until 2:00 o'clock this afternoon.

(Thereupon, a recess was taken to 2:00 o'clock p.m.) [515]

Friday, March 16, 1956—2:00 P.M.

Mr. Sellers: Your Honor, I want you to know that we tried to get together and we came a little close, but we weren't successful.

The Court: Well, maybe I can say something that might throw some different light upon the

(Testimony of E. F. Cornett.)

situation. You made an objection to the introduction of evidence upon the ground that you hadn't received proper notice.

Mr. Sellers: That is correct, your Honor.

The Court: As I read the statute, it can be received by the court in its discretion upon what terms he deems best.

Mr. Sellers: I think that is correct, your Honor.

The Court: It is my anticipation if I find in favor of the defendant in this case, that I will not allow the defendant costs, so I am just throwing that in, that inasmuch as the defendant has had an advantage which he could very easily be deprived of, an advantage which, at this case has developed, is a very material advantage, I think it is only fair that he be penalized to the extent that he wouldn't be allowed to recover his costs. I have not made any ruling yet, but I am just telling you what I am anticipating doing.

Mr. Sellers: That the defendant would be entitled to recover costs?

The Court: Would not be entitled to recover costs. In [516] other words, each side will take care of their own costs.

Mr. Sellers: In the event this case proceeds, each side will bear its own costs.

The Court: In the event this case proceeds and judgment is rendered for the defendant, each side will bear its own costs.

Mr. Sellers: Well, I think that would be fair and equitable.

(Testimony of E. F. Cornett.)

The Court: So if the question of costs is involved, you can forget the question of costs right now.

Mr. Sellers: Does that make any difference to you, Mr. Lyon?

Mr. Lyon: Not a bit.

The Court: Also, I might indicate to counsel I anticipated this case would finish today. From the present indication, if the case goes on, it will not finish today, so I will have to continue the case until Thursday or Friday of next week. In the meantime, that will give you an opportunity to investigate the situation in San Francisco.

Mr. Sellers: Thursday and Friday and next Monday following, I will be in Philadelphia and New York taking depositions.

Mr. Lyon: May it please the court, I have one witness I can get through with in a half or three-quarters of an hour and we will be through.

Mr. Sellers: I am not through with this man yet. [517]

Mr. Lyon: It depends on how much time you want.

The Court: You may proceed. I am going to have to stop promptly at 4:00 o'clock, so we won't take any recess until 4:00 o'clock now.

Mr. Lyon: Your Honor, may I make this suggestion? Mr. Bodinson, the owner of the Bodinson Manufacturing Company, has been kind enough to come down here to testify on our behalf, and he cannot remain after Friday.

(Testimony of E. F. Cornett.)

The Court: This is Friday.

Mr. Lyon: That's right. Can I take him out of order to insure I get him in this afternoon?

The Court: I have no objection. Will you relinquish this witness temporarily?

Mr. Sellers: I will leave that to Mr. Denny. Do you prefer to proceed with him or are you willing to have him step down?

Mr. Denny: I don't think it makes any difference.

Mr. Sellers: What do you want to do?

Mr. Denny: Let's defer to their request.

Mr. Sellers: All right. You may step down.

(Witness withdrawn.)

The Court: Call the next witness.

Mr. Lyon: Mr. Bodinson. [518]

### FRED W. BODINSON

called as a witness by and on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name.

The Witness: Fred W. Bodinson, B-o-d-i-n-s-o-n.

### Direct Examination

By Mr. Lyon:

Q. What is your present occupation, Mr. Bodinson?

A. I am head of my manufacturing company, building steel machinery.

(Testimony of Fred W. Bodinson.)

Q. What is the name of the company, sir?

A. Bodinson Manufacturing Company.

Q. How long has Bodinson Manufacturing Company been in existence?      A. It dates back——

Q. To the best of your recollection.

A. It is my recollection my dad started it when I was about six or seven years old, and I am 42 now.

Q. When was your first employment by the Bodinson Manufacturing Company?

A. Well, that started about 1928 or 1929, when I was a freshman in high school, working Saturdays and on vacations.

Q. How old were you at that time, sir? [519]

A. About 17, 16 or 17.

Q. You worked Saturdays and vacations at this company from then on until you got out of high school?      A. Correct.

Q. So that you have been with the company continuously since 1928 or 1929?

A. That's right.

Q. When did you take over the presidency?

A. 1940.

Q. What is the policy of your company with respect to the maintenance of drawings of various equipment which you have built?

A. Well, we are very particular about keeping an accurate record.

Q. Would you describe the system to me, please?

A. Well, when a drawing is made, before we get a job, it is given an E number, that's an estimate.



(Testimony of Fred W. Bodinson.)

After the job is processed through the shop, then it takes a L, M, S, or K number. Once a drawing is made under those names, it is then put into the index file in three ways. One by customer's name, second by the subject matter, whether it should be a conveyor, a crane, or whatever it might be, and, thirdly, it is classified as to size.

Q. Has that same system been utilized since you began your association with this company? [520]

A. Yes.

Q. For every material or structure your organization has made since you have been there, they have had a drawing, is that right?

A. To the best of my knowledge, yes.

Q. Are those drawings——

A. I will go one step further, if I might add, every year we have a policy of putting all the drawings for that previous year on microfilm in order to put them in safe keeping should we have a fire or loss of any kind. Drawings are all put on microfilm and stored in a safety deposit box in a bank.

Q. I show you now a drawing marked for identification as Defendants' Exhibit A and ask if you can identify that drawing.

A. This was a drawing made in our company, December 4, 1931, by Mr. Pete Hansen, his initials are P. H., and his signature I recognize.

Q. You are referring to the lower right-hand corner in which there is a small box?

A. That's right.

(Testimony of Fred W. Bodinson.)

Q. I see it says, "Drawn by," and the initials P. H. are there. What would that indicate to your records?

A. That is P. H., Pete Hansen is the name.

Q. Would that be the draftsman? [521]

A. That is the draftsman who drew the drawings.

Mr. Sellers: Your Honor, I object to that. He didn't say he saw him do that. There has been no basis for saying he knew he drew it.

The Court: Aren't these documents admissible under the document rule? I think I read it to you the other day. All in the world you have to establish is that you keep a written memorandum, it is customary to keep a written memorandum in your files, and it speaks for itself. He has testified that they keep the drawings. He doesn't have to testify he knows them. He doesn't have to testify he knows anything about the drawing.

Mr. Sellers: He testified the company has kept them. He said he started to work when he was 16 or 17, but had nothing to do with them at that time and he was in no position to know the policy of the company at that time.

The Court: He doesn't have to show the policy of the company.

Mr. Sellers: Well, your Honor, he is president now and he can state what the policy has been since he has been president, but how can he state the policy prior to that time in the absence of a showing that he knew it?

(Testimony of Fred W. Bodinson.)

The Court: Were those found in the files of your company?

The Witness: Yes, sir. [522]

The Court: Is it customary to keep such records as those?

The Witness: Yes, your Honor.

The Court: I don't know what more you have to establish.

Mr. Sellers: Who found them there?

The Court: It doesn't make any difference.

1732 says that any writing or record, any writing or record, whether in the form of entries in a book or otherwise, made as a memorandum or record of any transaction, act, occurrence or event, and this certainly is a memorandum or record, a drawing, shall be admissible in evidence first, if made in the regular course of business, and this man testifies that it is the regular course of business to keep the records.

Mr. Sellers: He is not able to state it was made in the regular course of business. He says it is customary to keep them, but I repeat there is a considerable difference between a policy of keeping records and establishing it was made in the regular course of business.

The Court: If you have an objection, it is overruled.

Mr. Sellers: I do object.

The Court: Overruled.

Mr. Sellers: I think we are entitled to know who made it.

(Testimony of Fred W. Bodinson.)

The Court: The record speaks for itself. The witness says he recognizes the signature upon the record. [523]

Mr. Sellers: No. There is no signature there, your Honor.

The Court: The initials.

Mr. Sellers: You mean he recognizes a printed P. H.? I don't think you want to say you recognize that P. H.—well, I don't want to take over. I am sorry.

The Court: Can you tell me you recognize those initials?

The Witness: I do.

Mr. Sellers: As having been made by a particular man?

The Witness: I do.

Mr. Sellers: You know that is his P. H. as distinguished from a P. H. made by any other engineer?

The Witness: I mean I am as familiar as I can be with his signature. I can show you others written in longhand characters, different ones. There are two different ways. You just know them, that's all.

Mr. Lyon: It is the same as a bank clerk would know.

Mr. Sellers: These are two letters in printed form as in drafting.

The Court: If you have an objection, it is overruled.

Mr. Sellers: I do object.

The Court: Overruled.

(Testimony of Fred W. Bodinson.)

Q. (By Mr. Lyon): Is it the custom of your company when you have a drawing of this type to have it checked by an engineer after it has been drawn by the draftsman?

A. That is the policy, but it doesn't always happen, I [524] am sorry to say.

Mr. Sellers: I object to that question and move the answer be stricken. This drawing was made back at a time many years ago and the policy today is not relevant.

The Court: It may go out.

Q. (By Mr. Lyon): Do you follow the same filing system, the same system of keeping records, that was followed in the company before you?

A. Yes.

Mr. Sellers: I object. There is no evidence showing he knows that.

The Court: Suppose we have a company a hundred years old. There is nobody in existence that can testify they saw the records made, but they testify, "We have always kept records, and this was found among our records"?

Mr. Sellers: Then it might come in as an ancient document, but this is no ancient document. If he is going to testify as to policy, he should testify to a policy that he knows about, not something which he only has as a guess.

The Court: Objection overruled.

Q. (By Mr. Lyon): Of your own personal knowledge, do you know what that drawing represents?

(Testimony of Fred W. Bodinson.)

A. That represents a weigh hopper for the Bode Gravel plant at 16th and Alabama in San Francisco.

Mr. Sellers: I object, your Honor. There has been no [525] showing that he was present when the drawing was made. There has been no showing he knows it was made to scale, there has been no showing he knows it was accurate. He is looking at a drawing in order to do this. It is a matter of opinion. I move the answer be stricken.

The Court: Denied. The objection is overruled.

Q. (By Mr. Lyon): Did you see a drawing of this Alabama plant while it was in the course of being constructed? A. I did.

Q. Did you go over the drawing with other personnel who were engaged in constructing the plant?

A. I was too young, but I was working on the project.

Q. And you did see the drawing?

A. I did see the drawing.

Q. Although your position with the company wasn't such that you would advise anybody?

A. That's right.

Mr. Lyon: I would like to offer this in evidence, your Honor.

Mr. Sellers: I object, your Honor.

The Court: It may be received in evidence.

Mr. Sellers: No proper foundation.

The Court: Exhibit A in evidence.

The Clerk: Exhibit A. [526]

(Testimony of Fred W. Bodinson.)

(The document referred to was received in evidence and marked as Defendants' Exhibit A.)

Mr. Lyon: Your Honor, I have another group of drawings. Do you want them introduced as one exhibit or individually?

The Court: It doesn't make any difference to me.

Mr. Lyon: Perhaps it will be easier on the clerk if we do them individually.

Q. I will show you a second drawing and ask if you found this in your files.

A. That is the same drawing, I believe.

Q. I am sorry.

A. That is a copy I brought down.

Mr. Sellers: I would also like to make an objection to the other drawing, your Honor, upon the basis that it is secondary evidence. It is not the original drawing but instead is a print. There is a stipulation in this case that copies can be entered subject to verification. We have not had the opportunity to verify the original drawing.

The Court: Objection overruled.

Q. (By Mr. Lyon): I show you now a second drawing and ask you if you can identify that drawing as one you found in your files. A. Yes.

Q. To what does this pertain, according to the records of your company? [527]

A. This pertains to the same job, Bode Gravel, under Kaiser Paving, same register number, same group.

(Testimony of Fred W. Bodinson.)

Q. This is also a drawing of an element of that plant at Alabama Street in San Francisco?

A. Yes.

Mr. Sellers: Objected to as calling for a conclusion. The drawing speaks for itself.

The Court: That's perfectly all right. If you have no objection, it can be admitted in evidence.

Mr. Sellers: I do object.

The Court: Then they have to lay a foundation.

Mr. Sellers: Your Honor, he was asked an opinion, does it show a certain thing.

Mr. Lyon: I asked according to the records of his company.

Mr. Sellers: What records? I think we are entitled to know what records you are referring to.

The Court: Objection overruled. You may proceed.

Q. (By Mr. Lyon): What does this drawing represent?

A. This represents the slide gates on the cement weigh hopper.

Mr. Sellers: I object to the question and move the answer be stricken. The document is the best evidence of what it discloses.

The Court: The document may be the best evidence, but I [528] can't read the document.

Mr. Sellers: The document speaks for itself.

The Court: But I can't read the document.

Mr. Sellers: Then he should call in an expert.

The Court: Haven't we got an expert?



(Testimony of Fred W. Bodinson.)

Mr. Sellers: Not so qualified. I don't know whether he can read blueprints.

The Court: What is your educational background? That is the way to establish it.

The Witness: I have a State registration as an engineer here.

The Court: Are you registered by the State of California?

The Witness: Yes.

The Court: Can you read blueprints?

The Witness: Yes.

Mr. Sellers: That is a self-serving statement, your Honor. I don't think that is any way to establish the fact that he can read blueprints.

The Court: What is your educational background?

The Witness: I studied in high school drawing and in junior college drawing. I spent many years in my own company drawing. I quite often do the drawings for the equipment we build today.

The Court: How long have you been making drawings of [529] your own?

The Witness: For the company since 1934 off and on.

The Court: How many drawings have you made?

The Witness: Oh, I haven't occasion to make too many of them. Most of them are sketches. Some complete drawings I put in the shop myself, but offhand I would say a couple of hundred.

The Court: In your work, is it necessary to read these drawings?

(Testimony of Fred W. Bodinson.)

The Witness: Absolutely.

The Court: How long have you been reading drawings?

The Witness: I have been reading drawings since 1929.

Mr. Sellers: But, your Honor, he may have been reading them wrong. He hasn't established the basis that he is qualified to read them at all, and the fact that he has been reading them wrong does not establish that he is an expert.

The Court: You know, some lawyers come up in court and sometimes they don't agree with the judge, and maybe they think the judge is reading the wrong cases.

Mr. Sellers: Your Honor, I move to strike that.

The Court: I think this man is qualified.

Mr. Sellers: On what basis, your Honor? He has said he can read drawings. That is a self-serving statement. He says he makes most of his sketches. When he wants a drawing made, he turns it over to the draftsman. He says he has read a [530] couple of hundred drawings or more. No one who has ever seen him read a drawing has said he could.

The Court: If you want to, you can bring an engineer up here and he can read them and give the interpretation.

Mr. Sellers: That is what should be done.

Mr. Lyon: He is an engineer.

Mr. Sellers: But that shows something relating to a particular plant. An engineer wouldn't be able to tell that.

(Testimony of Fred W. Bodinson.)

The Court: I think he was asked what does it relate to, and he said it relates to a particular plant.

Mr. Sellers: It's the same thing. Your Honor, he is not an expert. He may be, but he hasn't shown it.

The Court: I think he has as much of a background as your first witness did.

Mr. Sellers: My first witness has testified and now is no time to attack him.

The Court: Your first witness didn't have a formal education. His whole testimony was based upon the experience which he had in the field.

Mr. Sellers: He had two years in college, your Honor, and he had been—well, you know what he said as well as I. But in this case——

The Court: Suppose you proceed, Mr. Lyon.

Q. (By Mr. Lyon): Are you a registered engineer in the State of California? [531]

A. I am.

Q. You have passed the qualifications test that that requires?

A. At the time I took the test, yes.

Q. In mechanical engineering? A. Yes.

Q. What does mechanical engineering involve? The reading of blueprints?

A. And designing.

Q. Designing and reading of blueprints and that type of thing?

A. Yes. This one I have right here is an old one. It is 1951.

Mr. Sellers: Did you have it renewed?

(Testimony of Fred W. Bodinson.)

The Witness: Yes, I had it renewed. I haven't got it with me, but every year it is renewed automatically.

Mr. Sellers: I have to pay \$6.00 for mine.

Q. (By Mr. Lyon): Mr. Bodinson, in your duties as an officer of the corporation, as president of the corporation, do you have cause to read various blueprints concerning various construction jobs you are doing? A. Every day.

Q. Do you advise your personnel what to do on the basis of your having read these blueprints?

A. I do. [532]

Q. How to construct your equipment, how to construct the plants? A. I do.

Q. I will ask you again, what does this drawing relate to?

A. That relates to a slide gate, air operated.

Q. That would be a slide gate for what?

A. It is for the Bode Gravel plant job at 16th and Alabama.

Q. Is that the slide gate for the aggregate hopper or cement hopper?

A. That is for the cement hopper.

Mr. Lyon: May I have this identified as defendants' exhibit next in order?

The Court: It may be marked.

The Clerk: F for identification.

(The document referred to was marked Defendants' Exhibit F for identification.)

Mr. Lyon: I offer it in evidence.

(Testimony of Fred W. Bodinson.)

Mr. Sellers: I object, your Honor, upon the ground it is not properly identified.

The Court: Overruled. It may be admitted in evidence.

The Clerk: Exhibit F.

(The document referred to was received in evidence and marked as Defendants' Exhibit F.) [533]

Mr. Sellers: I would like to add there is no showing of authenticity. We don't know who made it, we don't know the source, where it was made, by whom or who saw it made.

The Court: Overruled.

Q. (By Mr. Lyon): I show you a second drawing and ask you to identify that, sir.

A. That is made by Mr. Pete Hansen, December 11, 1931, for the same job we are speaking of, made in San Francisco at our plant.

Q. And that illustrates what?

A. That is a bottom plate to a bin.

Mr. Sellers: I would like the record to show that the witness read this from the blueprint and didn't state that of his own knowledge.

The Court: The record may so show.

Mr. Sellers: Thank you.

Mr. Lyon: That would be one of the bottoms for one of the storage bins?

Mr. Sellers: I object to the question. It is leading.

The Court: Sustained.

(Testimony of Fred W. Bodinson.)

Q. (By Mr. Lyon): What does that show?

A. This is the bottom of one of the storage bins on the main hopper above, above the weigh hopper.

Q. Would that illustrate the device used in the plant constructed at Alabama Street in San Francisco? [534]

Mr. Sellers: I object to that question as leading.

The Court: Overruled.

The Witness: Yes.

The Court: It may be marked.

Mr. Lyon: May this be marked Defendants' Exhibit G and may I offer that in evidence?

Mr. Sellers: Object upon the same basis as the preceding objection.

The Court: Same ruling. It may be admitted in evidence.

The Clerk: Exhibit G.

(The document referred to was received in evidence and marked as Defendants' Exhibit G.)

Q. (By Mr. Lyon): I show you another drawing and ask you to identify that, sir.

A. This drawing is made by a man who is now deceased. You can't read it, but I can. Mr. B. P. Little. I may phrase that a little different. You can see the signature. It is difficult. But it is the long-hand of Mr. B. P. Little. It is on the Bode Gravel plant in San Francisco, and it concerns the cement weigh hopper and the rotary feeder above it.

Mr. Sellers: I would like the record to show that

(Testimony of Fred W. Bodinson.)

the identification was read from print in this case, also.

The Court: The record may so show.

Mr. Lyon: This shows the cement weigh hopper and the feed—— [535]

Mr. Sellers: I object to the question, your Honor, as leading.

Mr. Lyon: He just so stated, your Honor.

The Court: The witness can probably read the drawings much better than the attorney can.

Mr. Lyon: I think that is correct.

Q. What does that show, that drawing?

A. It shows the arrangement of the rotary feeder above the weigh hopper and the linkage of the weigh hopper to the scale lever parts.

Q. It shows the support of the—which hopper?

A. The cement hopper.

Q. The cement hopper. From the scale?

A. From the scale levers.

Q. Was that installed in the Alabama plant in San Francisco?

Mr. Sellers: I object, your Honor, as leading.

The Witness: Yes, it was.

Mr. Sellers: I move to strike it.

The Court: Overruled. The answer may stand.

Mr. Lyon: I would like to have this marked Defendants' Exhibit next in order and offer it in evidence.

The Court: It may be marked.

Mr. Sellers: Same objection, your Honor.

(Testimony of Fred W. Bodinson.)

The Court: Same ruling. It may be received in evidence. [536]

The Clerk: Exhibit H.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit H.)

Q. (By Mr. Lyon): I show you a further drawing and ask you if you can identify that.

A. That is a general arrangement of the weigh hopper showing the cement hopper, the aggregate hopper, and that is the scale there.

Q. Scale for what?

A. This is the scale for the cement, the one that is in the center, independently hung. That is the leverage.

Q. Does it show anything else?

A. There is a scale lever there.

Q. Scale levers. What are those for?

A. That is for the cement scale hopper. That is the cement hopper, weigh hopper.

Q. Which was in the——

A. In the center of the——

Q. Aggregate hopper?

A. Aggregate hopper.

Q. Was it independently movable in there?

A. Definitely.

Q. This is a drawing made by your company?

A. Yes.

Q. Found in your files? [537]

A. That is correct.

Q. Pertaining to the construction of the Ala-



(Testimony of Fred W. Bodinson.)

bama plant?           A. Correct.

Mr. Lyon: May this be marked next in order?

The Court: It may be marked.

Mr. Lyon: Offer the same in evidence?

Mr. Sellers: I object, your Honor.

The Court: Same objection and same ruling.

Mr. Lyon: Thank you.

The Clerk: Exhibit I.

(The document referred to was received in evidence and marked as Defendants' Exhibit I.)

Q. (By Mr. Lyon): I offer you another drawing and ask if you can identify this drawing.

A. That was made in our company by Mr. B. P. Little, the man I mentioned before, for the Bode Gravel plant, 16th and Alabama, and it shows the feeder drive for operating the cement feeder, and it shows scale beams. I believe that is for the cement.

Mr. Sellers: I ask the record to show, your Honor, that the identification as to the Bodinson Manufacturing Company and where it came from was read from the print.

The Court: The record may so show.

Q. (By Mr. Lyon): This drawing was found in your files?           A. That is correct. [538]

Q. It pertains to the construction of the Alabama plant?           A. That is correct.

Mr. Lyon: I would like to have this marked next in order.

(Testimony of Fred W. Bodinson.)

The Court: It may be marked.

Mr. Lyon: I offer it in evidence.

Mr. Sellers: Same objection, your Honor, for the same reasons.

The Court: Same objection and same ruling. It may be admitted.

The Clerk: Exhibit J.

(The document referred to was received in evidence and marked as Defendants' Exhibit J.)

Q. (By Mr. Lyon): I now show you a further document and ask if you can identify that.

A. This is a copy of the shop order. After we get a job at Bodinson Manufacturing Company, that tells who took the order, which happened to be my father, and it was sold to Kaiser Paving Company for the Bode Gravel Company, 16th and Alabama Streets in San Francisco. It details, spells out in detail, every bolt, nut, drawing number, bearing, hopper, general description of everything that goes into the construction of that particular order. [539]

The Court: Where did you get that?

The Witness: That I took out of our private files of my company.

Q. (By Mr. Lyon): It has been the practice of your company to keep a record of this type on all jobs? A. That is correct.

Q. Every time you get a job, you make out such a purchase order? A. Every job.

Q. And those records are kept how?

(Testimony of Fred W. Bodinson.)

A. Well, we keep them in this—this goes back to August 3, 1931, and generally there is a big file of drawings, or material with each order in a job of this size. We keep all those things, delivery receipts, invoices, buy-outs, foundry weigh slips, things of that nature, correspondence. We keep all of that in our files. Finally, about two or three years ago, we had to reduce our files because of space, so we went back beyond, well, from up to around 1932, November, 1932, and beyond that we threw out all those foundry slips and invoices, but we kept a copy of the general order file, and that is what this represents. So we have a complete story of everything we built all the way back, but we do not have the invoice for a valve, or something like that. But we do keep the order itself.

Q. That has been the custom of your company, to keep [540] records of this kind, since your association?

A. Yes.

Q. To the best of your recollection?

A. Correct.

Q. When you took over as president, you didn't change the system?

A. Not a bit.

Q. You continued the system?

A. We always refer back to these.

Q. You continued using the same system which you inherited from the former president?

A. That is correct.

Mr. Sellers: Now, I object to that question and I move the answer be stricken. He can't tell what the system was before he took over.

(Testimony of Fred W. Bodinson.)

The Court: It may go out. He said he didn't change the system.

Mr. Lyon: I am sorry. What went out? Could we have that read back?

(The record was read.)

The Court: He can't testify to what the system was before he took over. His testimony was he continued the same old system. I think that is as far as he can go.

Mr. Lyon: I agree with you, your Honor.

Q. According to your records, your method of keeping [541] records, what would this document indicate?

A. This particular document indicates that there is the drive machinery for 24-inch by 178-foot conveyor, and all the component parts, the air ram gates under the main holding hopper, aggregate hopper, and all the parts, component parts to that, the weigh hopper and all the component parts to that, including the cement weigh hopper and the water-holding hopper, a water tank on it, and all the component parts, such as the air cylinders, the pistons, the bolts, nuts and glands—well, that just about covers everything.

The Court: What is the date? Are there any dates on that?

The Witness: The date on that is August 3, 1931.

Q. (By Mr. Lyon): That would be the date that this order was sent down to the department that was to handle it?

A. To process it in the shop, yes.

(Testimony of Fred W. Bodinson.)

Q. How is it processed in the shop?

A. We make these things up in several duplications. In other words, one of those goes to the engineering department, one goes to the purchasing department, and one goes into the steel shop, and one goes into the machine shop, and one goes into the delivery room, the receiving clerk, and the purchasing agent in our company will go down over the list and he will see parts we have to buy out, maybe a cut steel pinion, if we weren't cutting pinions at that time, which we weren't [542] and still don't, buy some special rubber washers, or things of that nature.

The next man might come along and buy some castings, brass, bronze, for the cylinders. Rubber gaskets would be purchased outside. We don't make the rubber gaskets.

Then the steel shop would go down and check these things from the drawings and description here and proceed to order the steel to fabricate the things called for, and continue to incorporate all these component parts.

The receiving clerk, it would be his duty to receive these things that are bought on the outside, and mark them when they come in according to the marks on these drawings. For instance, this cylinder tube would be item R on sheet No. 4 of register No. 11198. That would go into a bin until such time as they were ready to use that, and then they would go to the bin and take that part out and put it on that particular unit.

(Testimony of Fred W. Bodinson.)

The shipping clerk uses the same document to check off everything when it is ready to ship.

Then all that is put back into the file after the job is shipped and probably goes to the cost department to see whether we made money or lost money. That's the end of it.

Q. Now, the parts that were ordered by this purchase order went into what construction?

Mr. Sellers: I object. There has been no basis to show [543] he is in any position to know where these parts went. He has identified this particular thing according to the policy of his company.

The Court: Well, the record speaks for itself.

Q. (By Mr. Lyon): According to the document.

The Court: The objection is sustained. What does the document show?

Mr. Lyon: It shows——

The Witness: It was shipped to the Bode Gravel Company, 16th and Alabama Streets, San Francisco.

The Court: The document speaks for itself.

Mr. Lyon: May I offer this group of job orders?

The Court: That may be marked for identification.

Mr. Lyon: I offer the same in evidence.

Mr. Sellers: I would like to object, your Honor. This is a copy. It is not the original.

The Court: You don't have to have originals under this rule.

Mr. Sellers: I am just objecting, your Honor. I think this is a good objection. There has been no basis laid to show that the speaker has any knowl-

(Testimony of Fred W. Bodinson.)

edge of what went in there, how they got together, how they relate to any issue related to this particular action. The only connection between this particular bit of evidence in this case is the fact that he got it from the company files, and on the letterhead happens [544] to be a name indicating some relationship to some of the bits of evidence here.

The Court: The objection is overruled. It may be admitted in evidence.

The Clerk: Exhibit K.

(The document referred to was received in evidence and marked as Defendants' Exhibit K.)

Q. (By Mr. Lyon): I show you a second job order and ask you if you can identify that.

A. This is to be delivered to the same plant, Bode Gravel, at 16th and Alabama, sold to the Kaiser Paving Company account. The order was taken by Mr. King, who was our chief engineer at that time, and Mr. Bjorn.

It calls for a cement weigh hopper for drawing L-2488, and the component parts of it, cylinder, slide gates, air cylinders, as stated before, and calls for the additional component parts that might be required.

Mr. Sellers: I move the answer be stricken, your Honor. The document speaks for itself. I also want the record to show that what he has read he read from the document.

(Testimony of Fred W. Bodinson.)

The Court: Objection sustained. The document speaks for itself.

Mr. Lyon: There is one other question.

Q. I note here on the first page of this job order the number L-2488, which is after one weigh hopper for cement complete [545] as per drawing L-2488. Could you explain what that means, according to the records of your company?

A. According to the record, when the man in the shop gets the order, he says that is what has to be built, and he gets hold of the engineering department and asks for blueprints or drawings and proceeds from there.

Q. According to the records of your company, would Exhibit A in evidence be the drawing referred to?

A. Yes. That would be it, and that portion of this drawing would be that cement hopper.

Q. In other words, the number L-2488 corresponds to the number on this drawing.

A. On this drawing, and the cement hopper corresponds to this particular section. That is what it is.

Mr. Lyon: May I offer this next group of job orders?

The Witness: That is how it is made.

Mr. Sellers: Same objection as to all the other documents, not properly authenticated.

The Court: Objection overruled. It may be received in evidence.

The Clerk: Exhibit L.



(Testimony of Fred W. Bodinson.)

(The document referred to was received in evidence and marked as Defendants' Exhibit L.)

Q. (By Mr. Lyon): May I show you another document and [546] ask you if you can identify that.

A. That is for the same account, Bode Gravel Company, 16th and Alabama. The order was taken by Mr. King, Jones and Little, all of our engineering department. This was December 17, 1931, and reads, "Change main scale beams on both cement and aggregate hoppers."

Mr. Sellers: I move the answer be stricken, your Honor. He is reading from the document and it speaks for itself.

The Court: I think the objection is good. The document speaks for itself. You can lay a foundation for the document being found in the files of the company.

Mr. Lyon: That's all I wanted.

The Court: And the document can be introduced in evidence.

Q. (By Mr. Lyon): This is a document found in the files of your company?

A. That is correct.

Q. I hand you the next in this group and ask you if you can identify that.

Mr. Lyon: May I mark this as the next in order, your Honor?

The Court: It may be marked.

(Testimony of Fred W. Bodinson.)

Mr. Lyon: And I offer it in evidence.

Mr. Sellers: Same objection.

The Court: Same objection and the same ruling. [547]

The Clerk: Exhibit M.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit M.)

The Witness: This is another copy of order taken by Mr. King and Mr. Bjorn——

Q. (By Mr. Lyon): Don't read the document. Just identify it as found in your files.

A. It is the same one found in the files of the same company.

Q. This is a purchase order, a job order which was found in your records?

A. That is correct.

Q. Pertaining to this particular construction?

A. Yes.

Mr. Lyon: May I ask that this be marked next in order?

The Court: It may be marked.

Mr. Lyon: And I offer the same in evidence.

Mr. Sellers: Same objection.

The Court: Same objection. It may be received in evidence.

The Clerk: Exhibit N.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit N.)

The Witness: This is another similar document,

(Testimony of Fred W. Bodinson.)

job order, found in our files for the same [548] purpose.

Q. (By Mr. Lyon): For the same job?

A. For the same job.

Mr. Lyon: May I ask that this be marked next in order and I offer the same in evidence.

Mr. Sellers: Same objection.

The Court: Same objection and same ruling. It may be received in evidence.

The Clerk: Exhibit O.

(The document referred to was received in evidence and marked as Defendants' Exhibit O.)

Q. (By Mr. Lyon): Would you thumb through this sheaf and see if you can identify that group?

A. These documents are all orders for the Bode Gravel plant, 16th and Alabama, found in our files.

Q. Thank you. A. Shop orders.

Q. Of the same nature as the last documents we had? A. That is correct.

Mr. Lyon: May I ask that these be clipped together and identified as our next exhibit?

The Court: They may be marked as the next exhibit.

Mr. Lyon: And I offer the same in evidence.

Mr. Sellers: Same objection.

The Court: They may be received in evidence. Same ruling.

The Clerk: Exhibit P. [549]

(Testimony of Fred W. Bodinson.)

(The document referred to was received in evidence and marked as Defendants' Exhibit P.)

Q. (By Mr. Lyon): Mr. Bodinson, when did you first see the plant at Alabama Street, in San Francisco, to the best of your recollection? Did you see it under construction? I will ask that question first.

A. Yes, I did. I would say it was one of the Saturdays in the fall of 1931, between August and December.

Q. How do you set that date, sir?

A. Well, at that time that was the only time I could perform work for the company, on Saturdays. I was in school the rest of the time. It was my habit and work that I went to the shop with my father on Saturdays and worked in the shop and went about the different jobs. This happened to be one right in town in San Francisco. We were a few miles from the job, and it was natural that I would go over to the job, because a lot of work was done on Saturdays in those days.

Q. Did you do any work on this plant while it was being constructed?

A. I would limit it to maybe the helpers classification, painting, or something of that nature. Not any construction.

Q. But you had an opportunity to observe the construction of this plant as it went up?

A. Well, most of it was built when I wasn't

(Testimony of Fred W. Bodinson.)

there, so [550] to speak, but I saw it on occasion, on Saturdays, and from then on I would make deliveries to it, maybe, later on in the years following.

Q. What type of a lot was this plant put up on? I mean was it just an open lot?

A. 16th and Alabama Street in San Francisco is right near the railroad, the switch tracks. It is an open lot, and this particular building was open all around at the base and had a stairway from the ground floor up to the batch floor, and from there on it was covered with galvanized sheeting for a short distance, and then it went into wood structures which housed all the sand and gravel in the bins to make the weigh floor.

The Court: Mr. Lyon, may I call your attention to the fact that you said you would take only a few minutes? We are approaching 3:30.

Mr. Lyon: I hope to be finished at 3:30.

The Court: Mr. Sellers should have some right to cross-examine, or the witness will have to come back.

Mr. Lyon: I will be through in five minutes.

The Court: Five minutes? You were only going to take four or five minutes to begin with.

Mr. Lyon: There was some difficulty in getting the drawings identified.

The Court: I cannot go after 4:00 o'clock. If Mr. [551] Sellers doesn't complete, the witness will have to come back.

Mr. Lyon: I will finish in two questions.

The Court: All right.

(Testimony of Fred W. Bodinson.)

Q. (By Mr. Lyon): Was this plant open to the public view for any one that happened to be around? I mean walking down the sidewalk, you could see the plant? A. Yes.

Q. Nothing secret about the operation?

A. Nothing secret about it.

The Court: What difference does it make? The plant was in operation.

Q. (By Mr. Lyon): Did this plant comprise, to your knowledge, an aggregate hopper having a cement hopper disposed therein suspended from separate scales?

Mr. Sellers: I object, your Honor.

The Court: Sustained. Here is just a boy working around the plant.

Mr. Lyon: Yes, sir.

The Court: He was only there a short period of time.

Mr. Lyon: That's right, but I believe his testimony will show that he has been associated with this plant for many, many years after that, your Honor.

The Court: You have got the drawings in evidence. What more do want?

Mr. Lyon: Nothing. I turn the witness over to Mr. [552] Sellers.

The Court: All right.

(Testimony of Fred W. Bodinson.)

Cross-Examination

By Mr. Sellers:

Q. When you were a boy, 16 or 17, and going around with your father, at that time you didn't have an engineering education? A. No.

Q. And at that time you didn't have the opportunity to compare the construction of the Alabama plant with the drawings used in making it, did you?

A. I believe I testified to that.

Q. You didn't have an engineering education?

A. I said that I did not compare them.

Q. I am sorry. I thought you said you did.

A. I said I had nothing to do with the drawings at that time.

Q. At any later date did you have occasion to take the drawings of the Alabama plant and compare it piece by piece with the Alabama plant itself?

Mr. Lyon: I will object to that, your Honor. I don't see the purpose.

The Court: Overruled.

The Witness: I have referred to the drawings many times [553] since.

Mr. Sellers: I would like my question answered, please.

The Witness: Ask it again, please.

The Court: Read the question.

(Question read.)

The Witness: No, sir.

Q. (By Mr. Sellers): Then, as a matter of fact,

(Testimony of Fred W. Bodinson.)

at the time it was built you don't know and didn't know that the plant was the equal or equivalent of the drawings which we have seen here and which have been introduced in evidence, and at no time since then have you compared these drawings with the Alabama plant to make certain that they identify that in detail?

A. Well, I have been down to the plant many, many times.

Mr. Sellers: I move the answer be stricken, your Honor, as not responsive. I would like to have my question answered.

The Court: It may go out.

The Witness: I am trying to get what you are driving at. Will you read the question again, please?

(Question read.)

The Witness: No.

Q. (By Mr. Sellers): Thank you. When did you start studying engineering? [554]

A. In 1932, September.

Q. When did you graduate as an engineer?

A. I did not graduate as an engineer.

Q. How many years engineering did you take?

A. I had two years junior college, preliminary engineering work.

Q. Where was that?

A. Marin Junior College.

Q. Marin Junior College?

A. That is correct.



(Testimony of Fred W. Bodinson.)

Q. Did you specialize in any particular type of engineering?

A. No. I was just building up the preliminaries.

Q. While you were a boy 16 or 17, you worked with your father at the plant on Saturdays and week ends. When did you become a full-time employee?

A. I believe it was full time in 1934.

Q. In 1934?

A. Yes, in the summer or fall of 1934.

Q. What was your capacity at that time?

A. Well, you might call it sort of co-ordinator in the shop, getting orders and jobs tied together, and later on went out on jobs directing steel work and putting jobs together as an erecting man, I would say, in 1935.

Q. When did you become an officer of the company? [555]

A. June, '40; July, '40.

Q. And prior to that time you had no part in formation of policy of the company, did you?

A. No, that is correct.

Q. So that what the policy of the company was with respect to the keeping of records of the handling of orders was entirely something outside of your field of activity back in the years 1931, 1932 or 1933, in that period?

A. That is correct.

Q. And, therefore, when you told us what the policy of the company was with respect to the records, you were telling us what it is since you have been in an official capacity with the company?

A. Which is no change prior to that.

(Testimony of Fred W. Bodinson.)

Mr. Sellers: I move to strike that as not responsive to my question.

The Court: It may go out.

Mr. Sellers: I would like an answer.

The Court: Read the question.

(Question read.)

The Witness: That is correct.

The Court: I might say I am not interested at all relative to the material that went into this plant. I am interested only as to the date.

Mr. Sellers: Only as to the date, your [556] Honor?

The Court: Only as to the date. That is the only thing I think is material. There is no question the plant was built. The question is whether it was built in 1931 or at a later date than 1932. The invoices show the date when the materials were delivered. We have the testimony of these other witnesses as to when it was built. I am satisfied that if you want to you could find in San Francisco from the Building Department when the building permit was issued. You can also probably find from the electric company when the first service was given.

Mr. Sellers: Your Honor, the fact that a plant may have been built at a particular date is no assurance that the particular plant here was built at that time.

The Court: You can also investigate and see whether or not there was more than one plant at that particular location.

(Testimony of Fred W. Bodinson.)

Mr. Sellers: Your Honor, we can do these things, but they are not in this record here. The fact that we can do it is no——

The Court: I have intimated I would give you time to make an investigation.

Mr. Sellers: Yes, your Honor, and we may have to take advantage of it.

The Court: I have indicated I would give you a reasonable time.

Mr. Sellers: Your Honor mentioned something about [557] Thursday or Friday of next week, and I will be out of town.

The Court: I want to get rid of this witness if I can, so let's proceed.

Mr. Sellers: I know you do.

The Court: Inasmuch as I have broken into your line of thought, I want to say this to you, that when I said a moment ago to you about assessing the costs, it included attorneys' fees. I don't want you to get any idea that I am making a difference between attorneys' fees and costs.

Mr. Sellers: I never thought so, your Honor.

The Court: I want costs to include attorneys' fees.

Mr. Sellers: I would like to clear up one thing for our own information, your Honor.

The Court: All right.

Q. (By Mr. Sellers): With respect to Defendants' Exhibit K, on sheet No. 4, we find reference made to one 6-ton weigh hopper with cement compartment and 120 gallon water tank integral per

(Testimony of Fred W. Bodinson.)

drawing L-2348 and consisting of: Can you tell us where that drawing L-2348 is?

A. It should be in our files. When I picked up these things last night I ran through a whole stack of files to get as many drawings as I could out, and whether I overlooked it or couldn't find it or it wasn't in the same group, I don't know, but I am strongly convinced we have a film of it, a micro-film of it. [558]

Q. You don't know where the drawing is?

A. At this moment, I don't. I suspect it is in the files where it should be, but I didn't check all the drawings and all the tag numbers.

Mr. Sellers: That's all, your Honor.

Mr. Lyon: No further questions.

The Court: May this witness be excused?

Mr. Lyon: Yes, he may.

The Court: You may be excused.

(Witness excused.)

Mr. Lyon: We have no further witnesses after we are through with this man.

The Court: You may proceed with your cross-examination of the other witness.

Mr. Sellers: Thank you.

E. F. CORNETT

a witness called by and on behalf of the defendants, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Sellers:

Q. Mr. Cornett, you will remember that in connection with Plaintiff's Exhibit 20, I asked you when the cement fell [559] from the center hopper G and from the aggregate hopper Y, where they fell to, where they came together, and I made a mark, rather, I drew a line from the letter X to a point in the collector hopper L and asked you if that was the point and you said yes, is that correct?

A. That is correct.

Q. You have also testified, however, that when the cement and the aggregate fell from the hoppers, they struck, came together three-quarters of the way down the chute, is that not correct? A. Yes.

Q. The point X that I marked is at the top of the chute and not three-quarters of the way down. Which is accurate?

A. Three-quarters of the way down.

Q. Let me finish, please. Which is accurate, the top of the chute or three-quarters of the way down?

A. Three-quarters.

Q. Then they don't come together at the top of the chute, do they? A. No.

Q. That is wrong? A. That is wrong.

Q. All right. Now, let's put a mark here where

(Testimony of E. F. Cornett.)

you think they would come together on this [560] chute? A. There is a mark right there.

Q. Right here.

A. There is a mark on there already.

Q. I will put a big circle there and we will run a letter out to an M for that. Now, that is where you say they now come together, right there?

A. That's right.

Q. Is that three-quarters of the way down the chute? That is in the upper one-quarter.

A. It is about three-quarters of the way down the chute.

Q. In other words, where the M goes through, that is three-quarters of the way down the chute?

A. That's right.

Mr. Sellers: I ask your Honor to take notice of the fact that the point M, which the witness now states is where the cement and the aggregate come together, is near the top of the chute, the top of the chute being here, and not three-quarters of the way down, as the witness states, and the witness formerly stated they came together at X, and he now states they come together at M, and he has previously testified they come together three-quarters of the way down. X and M are neither of them three-quarters of the way down.

The Witness: That would be three-quarters of the way down the chute. [561]

Q. (By Mr. Sellers): What kind of a chute do you have in this Alabama plant as actually built?

A. A V-type chute.

(Testimony of E. F. Cornett.)

Q. What is a V-type chute?

A. Broad at the top where the aggregate entered, and it tapered down to go into the mixer.

Q. And how long was it?

A. It was approximately 6 foot, 6, 7 foot long.

Q. Was it circular at the top?

A. Right at the top, it circled up so that there would be no spillage.

Q. And about what diameter was it?

A. At the top it was about three and a half feet.

Q. Three and a half feet in diameter?

A. Yes.

Q. How far down below the bottom of the aggregate hopper was it?

A. Approximately two feet.

Q. Two feet below, and how wide was the aggregate hopper above the collector?

A. That I don't remember any more.

Q. How does it happen you can remember the dimensions of the collector and you can't remember the dimensions of the——

A. I didn't give you any particular dimensions on the collector. [562]

Q. I am sorry. Didn't you just say that this is about—what did you say the dimension of the top of that collector was?      A. About four feet.

Q. Now, I would like to ask you, what is the dimension, if you know, of the bottom of the gate?

A. I have forgotten.

Q. You have forgotten. Didn't you say that in your work you worked around this plant and that

(Testimony of E. F. Cornett.)

you had occasion to repair all parts of it over a period of 14 years?      A. That's right.

Q. Well, how many times did you look at that gate?

A. Dozens and dozens of times, but it has been so long ago I just don't remember the dimensions.

Q. In 14 years you looked at that gate every day or six days a week, and you can't tell us what the dimension of the bottom of the gate was?

A. No, I don't remember.

Q. Can you tell us whether it was round or square?      A. A flat sliding gate.

Q. All right. The opening which the gate closed, was that round or square?

A. It was flat and square.

Q. Well, was it——

A. It ws square. [563]

Q. You don't remember how big it was on the side?

A. No, I don't remember the dimensions. It has been too long ago now.

Q. All right. The cement outlet up above that, what was the dimension of the cement outlet?

A. It was 12 by 18.

Q. How does it happen you can remember the cement outlet which is——      A. Well, it was.

Q. Pardon me. I haven't finished—which is positioned only about a foot from the aggregate outlet and you can't remember the aggregate outlet? I would like to have you explain that.



(Testimony of E. F. Cornett.)

A. I have reason to remember that because we repaired that more often.

Q. But you had to go through the aggregate outlet to get to the cement outlet, didn't you?

A. Yes.

Q. So actually you were bumping your head on the aggregate outlet more than you were on the cement outlet, weren't you?

A. Yes, but I still don't remember the aggregate dimensions. If I remembered them, I would state it, but I don't remember them offhand.

Q. What was the size of the cement valve that closed [564] the cement hopper?

Mr. Lyon: Your Honor, may I question the materiality of this, what the dimensions have to do with this?

The Court: I don't know. I think he has a right to cross-examine. He may be trying to show he doesn't have a very good memory. I don't know. Go ahead.

Q. (By Mr. Sellers): What is the size of the cement valve at the bottom of the cement hopper?

A. 18 by 12.

Q. What was the height above the ground of the bottom of the cement hopper?

A. From the aggregate hopper to the cement hopper?

Q. I beg your pardon. From the aggregate hopper to the ground, how far was it?

A. Clear to the runway?

Q. Clear to the ground.

(Testimony of E. F. Cornett.)

A. That would be clear down to the runway. About 35 feet.

Q. 35 feet. The length of that chute you have stated was how long?

A. Approximately  $7\frac{1}{2}$  or 8 feet.

Q.  $7\frac{1}{2}$  or 8 feet. If you took a section of it, was it round in section or was it triangular?

A. Round.

Q. Round in section. [565] A. Yes.

Q. Its central axis was vertical? It didn't slope off as we have shown in this drawing, is that correct? A. Yes.

Q. In other words, instead of this hopper going down, as I will now mark in dotted lines, it didn't do that?

A. It went straight down from the aggregate gate. This is not drawn very clearly. It went straight down the aggregate gate so that——

Q. In other words, it didn't slope over to the side as here? A. No.

Q. Did you put any water or was there any water put into the aggregate and cement as it came out of the hoppers?

A. As it come out of the hopper, yes.

Q. Where did you put the water in?

A. There was a valve you threw over here in the scale hopper——

Q. No, no, let's refer to this drawing.

A. ——and there is where your water hopper is, see. You threw the valve here and there was a pipe coming from this water tank and it circled down

(Testimony of E. F. Cornett.)

underneath the hopper and went right down in this loading hopper, back hopper here, and went right into the mixer.

Q. In other words, you simply dumped a stream of [566] water into the hopper L down at the bottom, just a single stream of water?

A. That's right.

Q. You didn't try to encircle the aggregate stream with the water?      A. No.

Q. Just dumped it right in?

A. No. The water went into the mixer proper.

Q. Into the mixer proper. I see. Mr. Murasko said you and he had worked together six years, I believe. However, you said that he and you had worked together for nine years. Now, I would like to have you tell me whether you worked with Mr. Murasko for six years or nine years. Do you remember?

A. I worked with him from 1930 to 1942.

Q. 12 years.

A. He left the plant in 1942. I had worked with him in 1930, and we had been apart, as I stated, when there was a depression on, and I was not there for a time, and then I came back.

Q. Well, I would like to know just how long you worked together.

A. He was there all that time.

Q. I know, but I would like to know how long you worked at that plant under Mr. Murasko. Was it six, nine or twelve years? [567]

A. As a superintendent, six.

(Testimony of E. F. Cornett.)

Q. As superintendent, six.

A. That's right.

Q. Did you work there in any other capacity?

A. Did I work there in any other capacity?

Q. Yes. A. No. Just as an operator.

Q. So really you worked under him for six years? A. Yes, sir.

Q. Not 12?

A. No. We worked a total together with the company of 12.

Q. Didn't you say you took a trip in 1936?

A. That's right.

Q. Isn't it a fact that you and Mr. Murasko started working together in the very year you took a trip? A. No.

Mr. Lyon: Your Honor, we have been over this ground before. I object to the question. It is repetitive.

The Court: Well, I won't restrict the cross-examination until 4:00 o'clock. At 4:00 o'clock I will restrict it in toto.

Mr. Sellers: Will you read the question?

(Question read.)

Q. (By Mr. Sellers): Were you working with Mr. Murasko [568] before or after you took that trip?

A. Probably working with him at the time.

Q. Working with him at the time. All right. How long had you been working with him at that time?

A. '30 to '36.

(Testimony of E. F. Cornett.)

Q. In other words, six years, and then you left there in 1942? A. No. I left there in 1947.

Q. And he left in 1942?

A. That is correct.

Q. So really you were working with him for 12 years? A. Yes.

Q. How did we get nine years? Where did that come from? A. I don't know.

Q. Nine years doesn't mean a thing to you?

A. Not a thing.

Q. You don't remember saying before you worked with him for nine years? A. No.

Q. We have a gate on the cement hopper, do we not? A. Yes.

Q. How is it operated? A. By an air ram.

Q. And where was that air ram [569] positioned?

A. At the side of the hopper here.

Q. Would you understand, then, that the ram to operate the gate on the cement valve actually extended right out through the aggregate hopper?

A. Yes, sir.

Q. And didn't the aggregate and all that fall on the ram?

A. No. There was a baffle over it.

Q. A baffle over it? A. Yes.

Q. And it protected it from the aggregate?

A. That is correct.

Q. So that the valve—how did you operate that? How did you protect it?

A. There was a baffle plate through here. Mr.

(Testimony of E. F. Cornett.)

Murasko didn't add that when he drew this picture here. There was a baffle plate coming down over it and the air ram worked under the baffle plate on to the cement gate.

Q. Would you like to draw that in in red on that—if I may, Mr. Lyon? Is that all right?

A. You would have to erase a hole through there.

Q. You just put in the dotted lines in red so we know about where that goes.

A. A big ram here, I mean a shaft, and your air ram would be out here. [570]

Q. Where was this protecting baffle?

A. Here.

Q. That is over the top of it?

A. That is correct.

Q. Do I understand that the ram moves with the weigh hopper, or how are you going to weigh that weigh hopper if you have got this ram connected outside there? The gate is rigidly connected to the ram, isn't it?

A. It is floating.

Q. What do you mean by that?

A. It floats in the air there.

Q. What pulls the gate out if this is floating in the air?

A. Air.

Q. Air pulls it out?

A. That is correct.

Q. Well, you have to have a leverage here for something to get hold of so when you pull here the gate will come open, don't you?

A. It is mounted on this baffle plate up here on a bracket to secure the air ram itself.

Q. The ram is mounted on this bracket?

(Testimony of E. F. Cornett.)

A. Yes, on the bracket.

Q. But the bracket is carried by the aggregate hopper, is it not? [571]      A. Yes.

Q. So then do we find that the ram is mounted by the—is connected to the aggregate hopper?

A. Yes.

Q. Well, now, if the cement hopper is supposed to move only with the aggregate hopper, wouldn't the fact that it is connected through the connection between the ram and the baffle, would that not adversely affect the accuracy of the weighing of the cement hopper?

A. No, because it is mounted on flexible springs.

Q. You mean those springs didn't exert any force?      A. No.

Q. What did you have them there for?

A. To get away from anything that would hold the cement hopper up.

Q. It didn't exert any force? Springs usually exert force. Why didn't you omit them?

A. Because they were on there for that purpose, to give this free play.

Q. Well, do I understand that your gate upon your cement hopper is connected through its own ram through a bracket to the aggregate hopper, which would seem to mean, if I understand what you say, that the two do not have completely independent movement.

A. The ram stood still. Only the gate [572] moved.

Q. All right. The ram stood still, so when you

(Testimony of E. F. Cornett.)

wanted to weigh the cement in the cement hopper with the ram standing still, how can you weigh it accurately?      A. Your scales are set that way.

Q. In the discharge of your aggregate hopper, does the aggregate hopper fall down all the way around in a circle?      A. Yes, sir.

Q. Don't you have a baffle here, a protecting baffle or bracket?

A. Yes. It is pitched like this where it goes over the top of that.

Q. Where it goes over the top doesn't it tend to produce an open area here on the side?

A. No, because it falls over the top and comes back together again.

Q. Well, wait. You have seen it do that?

A. Oh, yes.

Q. Is it a fact that the inner walls of your aggregate hopper extend down substantially to the gate valve, is that correct?

A. Not all the way down.

Q. Not all the way down. Do they extend as shown here?      A. Practically.

Q. When did you observe that these inner walls of the [573] aggregate hopper do not extend into the plane of the valve?

A. You can see that each time you worked on it. I had to clean it up.

Q. You are sure that if the drawings showed that inner wall extending down the plane of the valve, that they would be in error?



(Testimony of E. F. Cornett.)

A. I didn't see the blueprint. I don't know. But I know they didn't go clear down.

Q. You do know that a drawing showing this plant construction with that baffle going down to the slide plate valve is in error because you saw this for 14 years and you know that doesn't go that far down?

A. I would say that is correct. I didn't see the blueprint. If the blueprint shows it, it is not right.

Q. And to the extent that that is wrong, the blueprints are wrong or any showing that shows it that way is wrong?

A. That is approximately right the way it stands right there.

Q. And about what is this distance here below the end of the inner baffle and the gate?

A. Oh, about eight or ten inches.

Q. Eight or ten inches. That is the way you remember it?

A. That's right. [574]

Q. You were with this company 14 years at this plant, Mr. Cornett. Were there any changes that took place in this construction during the time you were there?

A. What do you mean?

Q. Well, I will limit my question to the relationship of the aggregate and cement hoppers.

A. No.

Q. They were that way when you first went there?

A. As originally designed; yes.

Mr. Sellers: I move that answer be stricken. It is a conclusion of this witness. He doesn't know how it was originally designed. He only knows how he first saw it.

(Testimony of E. F. Cornett.)

The Court: It may go out.

Mr. Sellers: Please read the question.

(Question read.)

The Witness: Yes, sir.

Q. (By Mr. Sellers): And it remained that way without change during the whole time you were there? A. That's right.

Mr. Sellers: That's all, your Honor.

Mr. Lyon: No further questions, your Honor.

The Court: All right. You may step down.

(Witness excused.)

Mr. Lyon: The defense rests, your Honor. [575]

Mr. Sellers: We are tired, too, your Honor. We rest.

The Court: I have been looking at my calendar. How much more time do you anticipate it is going to take to complete the case?

Mr. Sellers: We are going to spend a few days to try to check upon this new and surprising evidence.

The Court: I am going to give you time

Mr. Sellers: I know you are, your Honor, but what additional time will be taken will be dependent upon what we discover, but I will be surprised if we will require all of another day. We may not require more than half a day.

The Court: How about March 30th? That is two weeks from today. Don't tell me you are going to take depositions on March 30th.

Mr. Sellers: Your Honor, I am taking one in New York on the 26th and I will be back here on the 27th.

The Court: I thought you said the 22nd and 23rd.

Mr. Sellers: Those are in Philadelphia, your Honor. I will be leaving here on the 21st and I will be in Philadelphia until that week end and then in New York.

The Court: If it goes over beyond the 29th, I am starting a big antitrust case in April, and the only thing I can do in April is give you a Monday afternoon.

Mr. Sellers: That would be all right.

Mr. Lyons: That is perfectly all right with me as long [576] as Judge Harrison doesn't want me. I am starting a case there on the 17th of April.

The Court: How about April 23rd? That will give you nearly a month. That will give you time to investigate.

Mr. Sellers: I don't have my calendar, but as far as I know, that is all right.

The Court: I will continue this case until April 23rd at 2:00 o'clock in the afternoon. If you don't have too much testimony, I will hear your arguments.

We will now recess until tomorrow [577] morning.

Monday, April 23, 1956—2:00 P.M.

The Clerk: No. 17,121-HW Civil, C. S. Johnson Company vs. Merle Stromberg, et al.

Mr. Lyon: Ready, your Honor.

Mr. Sellers: Ready.

The Court: On this Stromberg matter, I continued it until this afternoon in order to give the plaintiff an opportunity to make an investigation in San Francisco to determine whether or not the plant as described at the trial had been established when the witnesses said it was established and whether it did the things the witnesses said it did. I am perfectly willing to hear you at this time.

Mr. Sellers: May it please the court, the plant dates back to 1931, your Honor will remember, it is so alleged, and it is the testimony of one of the defendant's witnesses that the plant was disintegrating in 1947 and the plant was scrapped. We were unable to find that was not a correct statement. As of this time there is no plant so far as we can ascertain that can be checked to see what was in it.

The Court: Well, I am satisfied, as I said before, there is some evidence in the Water Department or in the Power & Light Department as to when service first was given in this plant.

Mr. Sellers: If I may say so, your Honor, that would [580] only establish that there was a plant there.

The Court: That's right.

Mr. Sellers: We are not particularly concerned with whether or not there was a plant there, but whether or not there was a plant there which anticipated the patent here in suit, and whatever might be in the Water Department or in the way of issued licenses would not establish that point.

The Court: What are we going to do with the testimony of these witnesses?

Mr. Sellers: Well, your Honor, I am going to throw it out, if I can.

The Court: All right.

Mr. Sellers: In other words, there has been testimony given here, which was not noticed properly, and your Honor has tried to do equity in that connection by giving us additional time, for which we thank you.

On the other hand, it was a fact that at the time of the trial we didn't have the opportunity to study the drawings that were produced and to examine these witnesses with that preparation. The witnesses are no longer here, and we are not asking that they be returned at this time, but we believe that under the governing rules of law this alleged prior use is not properly before this court, and that which is before the court does not carry conviction.

It is our understanding that in addition to pursuing [581] any additional evidence this afternoon, we would also have our final arguments. Am I right in that, your Honor?

The Court: I will be glad to listen to you.

Mr. Sellers: I think, then, that is where we should go from here.

Mr. Lyon: Do you have any objection to my introducing this?

Mr. Sellers: I will object to its being introduced if you offer it, certainly.

Mr. Lyon: Two matters, your Honor. First, you will recall during the time Mr. Bodinson was on the

stand, he identified a series of drawings of this plant, one of which was missing, and there was a request by counsel to produce it, and I have this drawing.

Mr. Sellers: I don't believe that shows in the record, Mr. Lyon. I believe that was off the record, and whether it was mentioned or not, no proper foundation has been laid, its relevancy is not shown, and we object to it.

Mr. Lyon: I merely produced it for your convenience. I do have a copy, your Honor, of the Bureau of Buildings Inspection for the City and County of San Francisco for the Alabama Street plant in question dated June 24, 1931. I would like to offer this in evidence on this basis. The copy I have is not certified. I believe it is a public document and you could take judicial notice of it, but may I put it in evidence [582] subject to my replacing it with a certified copy?

Mr. Sellers: I object to it upon the ground no proper foundation has been laid, it has not been properly authenticated, and certified, and there is no relevancy shown.

The Court: I will have to sustain the objection upon the ground that you haven't got it certified. I don't think I can take judicial knowledge of a filing in San Francisco, can I?

Mr. Lyon: Your Honor, I am not an authority on that. My only question was may I introduce this and have it ignored if I don't substitute a certified copy?

The Court: You can have it marked for identification, if you wish.

Mr. Sellers: I object to it in evidence, your Honor.

The Court: I don't think you can object to having it marked for identification.

Mr. Sellers: I don't see that it is relevant, your Honor. Well, I can't object, I don't think, either.

The Court: It may be marked for identification only.

The Clerk: Defendant's Exhibit Q for identification.

(The document referred to was marked Defendant's Exhibit Q for identification.)

Mr. Sellers: Except I could object on the ground that the defendant has rested.

Mr. Lyon: We have a stipulation that you and my predecessor in interest entered into which may well cover this. [583]

Mr. Sellers: I am referring to the entrance of this, certified or uncertified. If I have stipulated—

Mr. Lyon: Your objection does not go to the question of certification, then?

Mr. Sellers: If it is relevant and admissible, I will abide by my stipulation. I do believe the record shows uncertified copies can be admitted subject to verification. I do recall that.

The Court: We will have it marked for identification only, and it will stay here.

Mr. Sellers: I am sorry, Mr. Lyon. I didn't have that in mind.

The Court: I think the record is sufficient without that, Mr. Lyon.

Mr. Lyon: Well, your Honor expressed some interest in it and I wanted to offer it.

The Court: I know that for the purpose of indicating to the plaintiff I thought the plaintiff could get certain information relative to when this plant was established and when service was first given to it, that's all.

Mr. Sellers: Thank you, your Honor.

The Court: All right, now. You may proceed.

Mr. Sellers: Before I start proceeding, your Honor, might I ask how much time we have?

The Court: How much time do you want? [584]

Mr. Sellers: I conceive that very well we will need, depending upon the number of questions your Honor asks, and I invite those, but we are going to need an hour probably for the purpose of opening and rebuttal.

The Court: I will give each side 45 minutes.

Mr. Sellers: That will hardly do, your Honor.

The Court: I give only 30 minutes when they have to talk to a jury. You don't win lawsuits by argument, but by evidence.

Mr. Sellers: Your Honor, if we don't win this lawsuit here, we may not win it at all.

The Court: That's right.

Mr. Sellers: May it please your Honor, this is an infringement action, your Honor will recall. The action was brought by the C. S. Johnson Company, a corporation, manufacturing batching plants and batching equipment.



The defendant is an individual doing business under the name of California Batching Equipment Company, Mr. Stromberg.

It was alleged that he infringed certain things claimed in Johnson patent No. 2,138,172.

Your Honor will recall that there was some little confusion about the fact that we didn't point out the patent had expired, and I want your Honor to know in looking over my notes for an opening statement, the second line said that the [585] patent had expired, so I would have told you, your Honor, had I had the opportunity to make an opening statement. The patent did expire. On the other hand, I repeat that there would not have been one iota of change in our side of the case had that not been the case.

The patent was issued to the C. S. Johnson Company and it contained certain claims of which we allege claims 1 to 5 were infringed.

Our first witness was a man named Mr. Wright, your Honor will recall. He was a man with a very considerable background in the field of concrete and batching equipment, an inspector for the City of Los Angeles, very fine background. I believe his testimony carried conviction.

Mr. Wright applied claim 1 of the patent in suit to the Exhibit 16, I believe it was, of the plaintiff's exhibits, and clearly showed that the claim read upon the Stanton construction. It was also applied to the Johnson construction.

Exhibits 14 and 16 were used in that connection, and your Honor will recall that the two plants were

shown there side by side. The witness read and was given the individual parts of the claims and he applied those individual parts to the construction of those two plants.

I don't believe, your Honor, there is any reason to doubt but that claim 1 of the patent in suit does read upon both the patented construction and upon the construction made [586] by the defendant here, known as the Stanton plant.

Furthermore, I believe the record will show Mr. Stromberg's own testimony was to the effect that the provisions of claim 1 would read upon all of his plants having a central cement hopper which is independently movable.

Claim 5 was then referred to and that claim was applied by the witness Wright to the Johnson and Stanton plants.

Your Honor will recall that claim 5 of the patent reads:

“\* \* \* and instrumentalities to supply water to the flowing shaft of aggregates in a tubular stream surrounding said aggregates and flowing into same at an angle thereto.”

It was shown that that particular claim read upon both the patented construction and also upon the Stanton plant construction.

Mr. Stromberg also testified that the showing of Exhibit 14 illustrated the construction of the Stanton plant and was typical of all of his plants having a central hopper and independent weighing means,

although he also stated at a different time that only the Stanton plant had the water, I do believe.

So I think there is just no question but what claims 1 and 5 read upon the alleged infringing constructions as illustrated by those exhibits, which exhibits were properly set [587] forth and identified as being accurate and made by a man who examined the plants and made them to scale, and made them accurately.

I think infringement was established. Now, if infringement was established, *prima facie* infringement, there remains a question of whether or not there was invention present and whether or not there was novelty.

Now, relative to the question of novelty, the patent art cited by the defendant here to anticipate simply fails to anticipate. That prior art doesn't teach a central cement hopper situated within the aggregate hopper. It fails to teach cement and aggregate hoppers having their own weighing means, and it fails to teach a cement hopper discharging centrally through the discharge of the aggregate hopper, and I use those various elements in combination.

The testimony of the witnesses Wright, Pearman and the defendant Stromberg was in agreement that a hopper in this field includes a body and an inlet and an outlet.

None of the witnesses had ever seen a hopper which did not discharge in its lowest point, and they testified in order to be operated the discharge had to be at its lowest point or all of the cement

wouldn't fall out. That obviously applies to the aggregate hopper, too.

The prior art which apparently was relied upon by the defendant included Robb, 1,750,244 and the patent to Johnson, [588] 1,687,499.

The Robb patent is deficient as an anticipatory patent in that it fails to teach a hopper within a hopper, and instead it has side-by-side arrangements, and there is no discharge of cement through the discharge of aggregate as is inherent where the cement hopper is within the aggregate hopper.

We have the improved construction result, your Honor, that our cement is discharged through the flow of aggregate, and that simply is not true in Robb. There was no independent cement hopper within the aggregate hoppers at all and, furthermore, there was in Robb no spray around the aggregate shaft encircling the cement shaft as called for by claim 5.

As to the Johnson patent, which would seem to be the next patent of greatest interest to the defendant, there is no hopper within a hopper. There is no cement bin within the center of the discharging aggregate. There are no independently movable hoppers. There is no central feeding of cement into the shaft of aggregate. There is no discharge of cement through the discharge outlet of the aggregate, and there are no scales. In other words, your Honor, it is crystal clear that the two references which we sense the defendant relies upon most definitely fail completely to anticipate.

None of that art teaches the patented construc-

tion which renders it possible to obtain the advantages which our construction obtains: [589]

1, that the cement must discharge through the aggregate outlet, and

2, that the aggregate will fall through the aggregate outlet first and so precede the cement and thereby prevent the cement striking metal parts and the cement striking water in the mix truck and balling up. That was very definitely important. Our Mr. Wright so testified, and the witness Pinne so testified.

Now, relative to the presence of invention in our patented construction, it has been suggested that no invention would be required to make that construction and that individual weigh hoppers were old and that no invention would be required to bring spaced hoppers together.

Well, if bringing those hoppers together would obtain our result, that wouldn't be a bad argument, but the simple fact is that you could bring them together, but you wouldn't get our result unless you provided a single discharge outlet for your aggregate and discharge your cement through the discharge of the aggregate, and that is nowhere suggested except in the patent in suit.

Certain advantages of our construction comprise pre-mixing at the time of discharge to effect a reduction in the mixing time necessary to mix.

Your Honor will recall there was some discussion about how important that was. The fact is where these trucks [590] are coming into these plants one

after the other, the cutting down of a few seconds in loading time becomes important.

Furthermore, it is an advantage to have the insurance that the product will be satisfactory, and that it just won't be right part of the time.

The protection of the cement by the enclosing wall of aggregate, which characterizes our construction and which does not characterize the construction of any of the prior art, singly or combined, is this. We have less air pollution in an area such as this, and certainly anything which will give us less air pollution in this area here is important.

It prevents the "hanging up" of the cement in the discharge passages, and it prevents the balling up of the cement in the mixer. Your Honor will recall those terms. It was brought out that under certain conditions where the cement came from the side, the moisture from the aggregate would cause the cement to gum up, to hang up in the batching unit, and also where it falls down into the mixer first, into the mixing truck, it would ball up if it hits the water.

Our construction prevents improper discharge through having the aggregate below the cement so that the aggregate must fall out first, and also it has the advantage, by making the construction we do, you get a lower plant height, and a lower plant height obviously can result in decreased costs.

There is a new element present in the combination of [591] our patent in that we provide a single discharge upon opposite sides of the central cement

hopper. There is no teaching in the prior art of an arrangement of those various hoppers as we have them. There is no teaching in the prior art of our improved result.

I respectfully point out to you that if I had more time I could go in and cite the law on the fact that if you have a new arrangement and a new result, you have all the elements of a patented object.

I would like now to touch just briefly upon the testimony of the witnesses. I have referred to Mr. Wright and the fact that he applied the claims 1 and 5 to the patented construction and to the construction of the Stanton plant. The fact of infringement was clearly established.

Mr. Wright, whose testimony is entitled to weight, testified he to his personal knowledge could operate a Johnson type plant under wind conditions which would make it necessary to shut down other types of plants, and he testified that in his opinion the Johnson type plant was superior. He testified concerning the pre-mixture of the cement and aggregate as the two were discharged from the hopper, and that that would provide a superior mix, that it would eliminate difficulty in the mixing truck and would even reduce the danger of balling up.

There was just no question but what Mr. Wright believed that the patented construction was superior for the [592] reasons mentioned.

He also testified, as I have said, that a hopper is essentially a body having an inlet and an outlet.

The witness Buckler was provided who was brought in to establish commercial success. We

could have brought many other witnesses for that purpose in addition, but there is just no question but what the particular construction of this patent has been really commercially successful.

Mr. Buckler testified since about 1951 about 60 per cent of all plants sold in the area in which he sells, that is the 11 western states, 60 per cent of all plants sold had been Johnson type plants. There is little doubt, I believe, that the evidence shows that the Johnson type plant has been a commercial success.

Your Honor will recall that Mr. Pearman was called as a witness and he testified his Gardena plant and his Stanton plant, he was the owner of both, were substantially the same except that the Stanton plant was bigger and better, and that they functioned the same otherwise.

There was also evidence brought out later that only the Stanton plant had the water, but except for that Mr. Pearman stated they were the same. I don't believe he made that distinction.

Mr. Stromberg was brought in, you will remember, the defendant here, and he testified that he obtained the [593] concept of the arrangement of the plant and that the Gardena plant was the first plant, that he obtained that arrangement concept from Mr. Pearman himself. That didn't ring a logical bell to this speaker. It seemed reasonable Mr. Stromberg must have known more about plants than Mr. Pearman and, as a matter of fact, your Honor will remember later on the witness stand Douglas Pinne testified that he, as one of the execu-



tives in charge of distribution for Consolidated Rock Company, the biggest company of its kind in the West, took over the operation, and Mr. Stromberg worked for him. That at the time he took over that operation, there were a number of plants, two of which were of the Johnson type, and at that time Mr. Stromberg had charge of the repair of all those plants, and it seems quite evident that Mr. Stromberg either didn't remember that at the time he built the Gardena plant he knew about the Johnson plants from having worked on them at Consolidated Rock, or that he intentionally misrepresented the knowledge.

It seems more likely that Mr. Stromberg, a builder of plants and a man who worked on those plants, would have gained that knowledge from his contact with the plants, having worked on them, rather than from Mr. Pearman who, according to his own testimony, had never built or never owned a plant prior to that time.

Mr. Stromberg was rather loath to admit, your Honor will recall, that there was any mixing action in the discharge [594] of the aggregate and cement hoppers together. The analogy of the ball rolling off the roof was pointed out to Mr. Stromberg, and how could it be prevented that the aggregate coming from the sloping sides would not describe an arc into the path of the cement so that certain intermingling and mixing would result, and Mr. Stromberg wasn't able to answer that question.

As a matter of fact, the defendant's own witness, Mr. Wisniski, later in the trial admitted that there

would be intermingling. He didn't like the word mixing, which in his opinion had a particular meaning, apparently it was a word of art for him, but that there would be an intermingling of the aggregate and of the cement was admitted by Mr. Wisniski.

Now, on behalf of the plaintiff, Douglas Pinne was brought in. He was superintendent of distribution for Consolidated Rock Products Company which, as I have said, is one of the largest concrete mixing plants in the world. He had some 23 plants, including plants of the Johnson type, and under his jurisdiction there were mixing plants, and he was qualified as an expert as a man of practical experience dating back to 1925. I think it rather clear to your Honor that his testimony was entitled to substantial weight.

He testified that with the side feed of the cement going into the collecting hopper the cement is at times prevented from going down by the flow of aggregate, and that the cement tends to come back in the reverse direction, in the [595] direction from which it came, and to fly out in all directions from the collector hopper, resulting in air pollution and, obviously, in inaccuracy of mixing.

He also stated that when the relationship was as in the Johnson plant, there was less dust and less air pollution, and accomplish more accurate mixing.

Mr. Pinne also stated there was a moisture problem present in the side feed type of plant which is eliminated in the Johnson plant. By that he meant that the aggregate contains moisture and when the

aggregate feeds down by the cement opening there, the moisture from the cement which has been stored there, will adversely affect the cement and will result in a gumming up relationship.

He also pointed out that balling up is eliminated entirely in the Johnson type plant.

He also pointed out that where the mix is dry and batched into a dump truck, the relationship of the side feed is undesirable in that the cement tends to go to one side of the dump truck and the aggregate goes to the other. That is a dry type of plant.

Mr. Pinne was definitely of the opinion that the central feed type, which characterizes the Johnson plant, is superior to anything on the market.

I would say that upon listening to Mr. Pinne, one couldn't hear that testimony without coming to the conclusion [596] that the Johnson type plant, in his opinion, which agreed with Mr. Wright's, was superior.

Then we have the witness Mr. Wisniski for the defendant. Mr. Wisniski was a bachelor of science with a degree in chemistry, primarily a chemist, and he testified that in his opinion getting the water in there in the right proportion was the most important thing. He contended there would be no mixing of the cement and the aggregate, but upon going into the matter we found that he didn't mean to say by that there would be no intermingling. In fact, he admitted that in a Johnson type plant in the discharge operation there would be intermingling of the cement and the aggregate which,

your Honor will recall, is not taught anywhere in the prior art.

Now, your Honor, we come to the defendant's witness Murasko, who testified in connection with the plant in San Francisco. He testified that in 1931 he was employed and at that time he said that the Bode Company constructed a plant on Alabama Street in San Francisco, and he went on to define what he thought that was.

Your Honor will recall that there was a complete absence of any documentary proof or evidence to support what Mr. Murasko stated, and that his recollection was entirely, so far as anything he brought in was concerned, based on what he remembered, unless, your Honor, he had his recollection refreshed by other drawings. [597]

Your Honor, my co-counsel will, after I have completed, like to discuss the question of the weight and the availability of Mr. Murasko's testimony and its anticipatory effect where it is completely oral, some 25 years after the event, unsupported by documentary evidence. Your Honor, such testimony is to be examined extremely closely, particularly where the corroboration is extremely sketchy.

The Court: What are you going to do with the plans? Are you going to disregard the plans entirely?

Mr. Sellers: Those plans, your Honor, do not belong in this case, as I will try to show you. They have been admitted by virtue of what is known as the business record rule, and I think before I have completed my argument, either I will convince you

that they are not properly competent evidence in this case, or you will believe that I don't understand the rule, one way or the other, because for my money those records were business records, we will admit, but your Honor was under the misimpression that all that was necessary to get those into the evidence was to show that they were business records. The rule just doesn't read that way, and I will discuss that point in a minute, your Honor.

Mr. Murasko testified working under him was Mr. Cornett.

Mr. Murasko didn't say anything about any plant that had a water discharge meeting the terminology of claim 5, your [598] Honor, and if you accept everything Mr. Murasko said as true, claim 5 still stands unanticipated.

Mr. Cornett testified, and it will be remembered he said he worked for the Bode people from about 1933 to 1947. He wasn't quite sure of his dates, he couldn't tie them in with any public record, unless it was the fact that he visited his uncle in Vancouver, British Columbia, and his uncle was mayor. Other than that, he couldn't remember anything. He took trips, but there was nothing to substantiate the dates he alleged.

His testimony was not very helpful. He was able to remember the dimensions of the hopper, your Honor will remember, but he couldn't remember the dimensions of the discharge gate. Here was a man that, according to his testimony, had to crawl through that gate to work on the cement gate. It

was suggested that he bumped his head on the discharge opening or gate, rather than on the cement, and yet he couldn't tell how big it was. He wouldn't even hazard a guess.

Your Honor, it will be suggested that possibly he got his information from seeing the drawings at a later date.

Now we come to the matter of Mr. Bodinson, president of Bodinson Manufacturing Company, San Francisco, and the ozalid prints which were brought in by Mr. Bodinson. What was Mr. Bodinson's testimony? He stated that he had been president of the Bodinson Manufacturing Company, San Francisco, [599] since the year 1940. He was first employed by the company in 1928 or 1929, when he was 16 or 17 years of age. That originally he used to work on Saturdays with his father, and that at the time he said the Alabama Street plant was being constructed, he went there with his father, your Honor will recall, and did some painting. He didn't do the construction work. He didn't have any contact with the drawings nor with the engineer. He was unable to state of his own personal knowledge or to identify any of the drawings that were produced and to connect them with the construction of the plant.

He testified that he had not compared those drawings with the plant construction at that time, and on cross-examination he testified that he had not at any later time compared the plant drawings with the plant.

In other words, Mr. Bodinson was president of the company. He produced some drawings, but he failed, and there was no attempt for him to connect those drawings with that plant. He produced drawings from his company records.

He produced a large number of exhibits which he stated, in the wording of the defendant's counsel, related, according to the company policy, to the Alabama Street plant. He didn't say they related to that plant. He didn't know. He testified he never saw the drawings at that time. He testified he had never compared them later. He was in no position, by his own admission, to say that those drawings related to [600] that plant, but according to company policy, whatever that means, he testified he took the drawings from the files of the company, and he said that the files were maintained as a matter of company policy.

Now, your Honor admitted those drawings under the provisions of 28 U.S.C. 1732. Well, your Honor, I would like to point out to you that those drawings, in my opinion, were erroneously admitted, and having been erroneously admitted, the question now is what weight is to be given to them. If every company record were by virtue of the fact that it becomes a company record to be competent and relevant, what an easy way to obtain evidence and to bring in anything. You don't have to say, "It is my evidence. I produce it. I have had it." And testify where it has been all the years, but you merely say it came out of the company files and by virtue of that fact it goes in.

If that were all, and your Honor virtually said in the course of the hearing that all he had to do was say that they came out of the company file, but I don't think your Honor will agree to that after we have finished our discussion.

He was the only witness, you will remember, to support those records as a part of the evidence in this case.

Now, your Honor, 28 U.S.C. requires two things. It requires that the records be, and I quote, "made in the regular course of business," and, two, it requires it was the regular [601] course of such business to make such memorandum or record at the time of such act, transaction or event, and within a reasonable time thereafter."

Now, when the Alabama Street plant was built, your Honor, according to your own statement, according to the record I have, you said, "Here is just a boy working around the plant"—

The Court: May I ask you a question?

Mr. Sellers: Yes, certainly you may.

The Court: Suppose a manufacturing company is building a plant. The plant is built. They establish their records. They take the blueprints and put them away in their files. Aren't the blueprints part of the official records?

Mr. Sellers: It is good to establish some occurrence, some event, some act, but what act, what occurrence or what event, your Honor? We have gone from a——

The Court: As far as I am concerned, those are



the blueprints and the drawings of the building in question.

Mr. Sellers: Who said that, your Honor? There has been no evidence of that.

The Court: Do they have to produce the fellow that drew the plans and have him testify?

Mr. Sellers: Your Honor, there is no competent testimony relating those drawings to that plant. The mere fact that on their face they happen to bear the same name does not [602] indicate anything. Let me finish, your Honor. Those drawings are not identified with that plant in 1931. Your Honor, when they put a new product on the market, a company comes out with a new model, before a model is produced and sold, it may have ten different prototypes and designs. There is not one iota of evidence to say, "We carefully searched our drawings and these are the only drawings we ever found or we ever made and have in our files relating to this plant."

The Court: But those drawings, when added to the actual testimony of the witness——

Mr. Sellers: What witness?

The Court: The first witness.

Mr. Sellers: The first witness knew nothing about the drawings, your Honor.

The Court: He described the plant itself.

Mr. Sellers: He said he worked there.

The Court: He described the plant itself and told how it operated.

Mr. Sellers: Yes, your Honor, and whether or not his evidence is entitled to weight——

The Court: His testimony and the drawings, if you add them, they dovetail.

Mr. Sellers: But, your Honor, you have no right, I respectfully submit, you have no right to dovetail these drawings unless they are properly before the court. What your Honor [603] is doing here is saying, "Well, these aren't before me properly, but notwithstanding I see them, and therefore I will combine them with the others."

The Court: No. That is what you are doing. I say they are before me properly.

Mr. Sellers: Well, your Honor, I mean if my argument be sound that is what you are doing. I do agree that you have admitted them, but I respectfully contend the fact that they have been admitted neither establishes their relevancy nor their competency.

I would like to go on, your Honor. I repeat that under 1732 it is necessary to show that those drawings, and I quote, were "made in the regular course of business." Now, who was it that testified that those drawings were made in the regular course of business?

The Court: Well, when you build a plant, don't you have to have a drawing?

Mr. Sellers: Who established that fact? You don't have to presume it, your Honor. It has to be established. What right do you have to presume that they were made in the regular course of business? It is a prerequisite of 1732 that they be made in the regular course of business, and there is not one iota of evidence that such is the case.

Mr. Bodinson testified that he couldn't establish that, and your Honor said he was a boy back at that period. Now, [604] who says they were made in the regular course of business? I don't say it. Counsel is in no position to say it. Mr. Bodinson disqualifies himself. Who says it?

For my money, your Honor, one of the essential ingredients of the entrance under 1732 is missing. I pointed out to your Honor at the time, and the record so shows, that it is quite a different thing to establish a policy of keeping records and to establish a policy of making records at the particular time. No one, certainly not Mr. Bodinson here, was able to take himself back to 1940.

The Court: It seems to me that when a business is established and records are kept, that the plans and specifications of the building which is built are a part of the official records of the business. I don't know how you can get around that.

Mr. Sellers: What do you mean by official records of the business, your Honor? I don't know that the corporation had any——

The Court: All right, scratch out official. The records of the business.

Mr. Sellers: Well, obviously, your Honor, under this rule you said they were admissible, but I am pointing out to you that I don't question they are part of the records, and I don't question but what if the proof would meet these two tests, that they are properly admissible. What I say is, your [605] Honor, you have no right to assume one simply because the one is established, and the fact of the

matter is that neither one is established, and I will tell you why.

Mr. Bodinson's testimony is only as to the company policy as of this time. He was there in 1940, and what the company policy was back in 1931, we have no evidence concerning at all.

Now, I ask your Honor, what right do you have to presume because the testimony shows that the policy is one thing today, and Mr. Bodinson stated he hadn't changed it, whether or not there were three other presidents before Mr. Bodinson who may have changed it. I don't know and you don't know.

The fact of the matter is in order to get this in, we have to presume, and I respectfully contend, your Honor, its admission is error.

Mr. Bodinson became president in 1940. The time in question is 1931. Mr. Bodinson couldn't testify to the company policy nor practice in 1940. You stated that he was just a boy painting around the plant. Are you going to let that boy tell us what the company policy back then was? Are you going to let him tell us that it was the company policy back at that time to make these drawings in the regular course of business?

The Court: Let's take Sears, Roebuck, for instance. Everybody that had anything to do with the original Sears, Roebuck [606] is dead and can't testify.

Mr. Sellers: All right.

The Court: Don't you think somebody can come

in and say, "This is our policy and has been our policy over the years"?

Mr. Sellers: Why didn't someone come in and testify to that, your Honor? Why didn't they? You ask me, and so now I ask you. They didn't. I am not saying someone couldn't have reviewed the records of the company, could not have gone back and could not have developed that sort of proof, but I say they didn't. I don't say just because they don't prove their case it is up to you or to me to presume they could have if they tried. I say the record doesn't support that evidence. What they could have done is pure speculation. The point is they didn't.

The Court: I don't want to interrupt, but I have got a criminal matter that I have to take care of. You have been working my reporter pretty hard. You have been talking for 30 minutes.

Mr. Sellers: Your Honor, I think this is critical, and I think you can see how critical it is.

The Court: I will let you continue after recess. We will take our recess now until 25 minutes after 3:00.

Mr. Sellers: How much more time do I have?

The Court: I understood you wanted your partner to say something. [607]

Mr. Sellers: Yes.

The Court: If you use up all the time, he is not going to get a chance.

Mr. Sellers: I respectfully point out, your Honor, 45 minutes is hardly adequate.

The Court: We will stand in recess.

(Recess.)

The Court: You may proceed.

Mr. Denny: Your Honor, I would like to prove to the court that even if those drawings are in evidence, it doesn't make any difference to the outcome of this case. The law on what it takes to anticipate a patent by proving prior public use is fairly well established. The leading case is the Barbed Wire patent case, 143 U.S. 275. There the patent in issue related to the well-known barbed wire.

One of the defenses was anticipation by prior public use. The defendants put in about six alleged anticipations, and as to one of them they brought in 24 witnesses who swore that they had seen that.

The Supreme Court in sustaining the validity of the patent had this to say:

“We have now to deal with certain unpatented devices claimed to be complete anticipation of this patent, the existence and use of which are proven only by oral testimony. In view of the [608] unsatisfactory character of such testimony arising from the forgetfulness of witnesses and their liability to mistakes, their proneness to recollect things the party calling them would have them recollect, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt.”

The Court: They use the words "beyond a reasonable doubt"?

Mr. Denny: "Beyond a reasonable doubt," your Honor.

The Court: What is the citation? I never heard that before.

Mr. Denny: 143 U.S. 275. Then again I am quoting:

"The doctrine was laid down by this court in *Coffin vs. Ogden*, 85 U.S. 18 Wall., 120, 124, that 'the burden of proof rests upon him,' the defendant, 'and every reasonable doubt should be resolved against him. If the thing were embryonic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only [609] progress, however near that progress may have approximated to the end in view.' "

Now, a more recent case I have found is from the District Court in the Northern District of California, decided in 1946, *Food Machinery Corporation vs. the Pacific Can Company, et al.*, 70 U.S.P.Q. 474. There the patent related to a can handling machine. The defendant relied on oral testimony of prior use and also on a figure in a prior patent drawing for anticipation. The court had this to say, and I quote:

"The defense of anticipation rests upon two points; first, that Fig. 5 of the Chapman patent

drawing reveals the principle and, second, that in 1923 Chapman actually incorporated this principle in one or more machines. The evidence on this second point is too confused and uncertain in the court's opinion to support a claim of prior manufacture, that the oral testimony of witnesses speaking from memory only in respect to past transactions and old structures claimed to anticipate the patented device, physical evidence of which is not produced, is very unreliable and must be so clear and satisfactory as to convince a court beyond a reasonable doubt before it will be accepted as establishing anticipation, is a rule that has long been recognized by the courts," and cases are cited. [610]

It goes on, and I quote:

"If anticipation is to be found in drawings unaided by any text, the disclosure must be clear. Chapman's Fig. 5 makes no such clear disclosure. Defendant's interpretation is pure conjecture and insufficient to support the defense of anticipation."

Your Honor will remember Johnson in his patent described pre-mixing action in a weigh batcher for concrete. He spelled out in detail how the aggregates are to be brought together at the point of discharge and that the cement was to flow onto and into the aggregate.

Your Honor will remember the defendant's structures were shown by Exhibit 14, to which no significant exception is taken by the defendant.

Has the defense proven its case of anticipation?

I have this to say about the credibility of Murasko's and Cornett's testimony. First, I would



like to say that at the beginning of Murasko's testimony, defendant's drawing, Exhibit A, was placed before him and from that he began to testify. There was considerable voir dire after that, and it was agreed by the court since the drawing was not in evidence it should be removed from in front of him.

He then went on to testify and made a drawing entitled Defendant's Exhibit E. Now, this was a man who testified that at the time he was operating on this plant he had [611] nothing to do with drawings and was there only to operate the plant and see that it worked properly. He was a batch operator. I would say in my limited experience that is about one level above a common laborer. He is talking about something that he looked at some 23 to 25 years ago. I suggest that it is more than mere coincidence that the drawing he made resembles Defendant's Exhibit A.

I would ask the court to look closer at Defendant's Exhibit A.

During Murasko's testimony, he said that the walls surrounding the cement compartment terminated considerably short of the bottom of the aggregate compartment. That doesn't conform, but certainly conforms to defendant's case of anticipation, and it was rather convenient, I think, that Murasko would find that point of distinction over the other evidence placed into evidence by the defendant.

Murasko also stated in his testimony that the aggregate batcher that he operated was six inches from the ceiling and that the cement batcher was

six inches from the cement compartment and that the aggregate batcher was three feet from the ceiling. That is not corroborated by that drawing.

Murasko further said that to him there was no problem as to how the materials went into the mixer, in answer to a question of the court's. Murasko said there was a cement hopper inside of an aggregate hopper. You can't tell that [612] from defendant's Exhibit A.

In making his drawing, Murasko forgot all about a tunnel or baffle which was later put into that Exhibit E by the witness Cornett. At the time there was no such showing in Defendant's Exhibit E. Murasko testified that the aggregate completely surrounded the cement and intermingled with the cement.

Now, what about the witness Cornett? All of Cornett's testimony was given with Defendant's Exhibit E laid before him. I respectfully suggest that that leaves considerable doubt as to whether he was testifying from his recollection or from the drawings that he was being shown.

Further, Cornett said that the cement hit the aggregate three-quarters of the way up or down the chute, and that was left considerably in doubt.

Cornett also said that the operating mechanism for the cement batcher gate that he saw was affixed to the aggregate batcher. When he saw he had talked himself into a corner, he conveniently put some springs on that operating mechanism and maintained that the springs had no effect upon the operation of the cement batcher.

Then when Cornett was interrogated as to the details of the weigh batcher he was describing by his recollection, I think it is interesting to note that he could describe every part in detail shown in the blueprints later introduced [613] in evidence by the defendants. But when co-counsel interrogated him about the detail of the aggregate discharge gate, he couldn't recollect anything, and if your Honor will examine all the blueprints introduced in evidence by the defendants, you won't find a showing of the aggregate discharge gate or exactly how the aggregate hopper discharge was arranged.

What about the drawings themselves? I believe if you will look at the drawings you will see that in various details they don't conform to the testimony of either Murasko or Cornett, and that any attempt to make them conform to that testimony must rely on pure conjecture as to just how the apparatus was arranged.

Co-counsel has further pointed out that there is no testimony in the record to show that such a batcher as indicated by those drawings has ever been made or delivered or used publicly.

I think I have shown, your Honor, that in various details, and if we take everything at face value, three different types of weigh batchers have been testified to—two have been testified to and the third there has been an attempt made to put in by drawings, presumably as corroboration, but I submit there has been no corroboration, and particularly if you will observe the testimony as to the details of the discharge of the cement and aggregate

batcher, you will find that the drawings don't conform to what the witnesses would like us to believe existed some 23 or 25 years ago. In other words, there [614] has been no corroboration.

From the drawings, you can't tell what the aggregate hopper looked like and particularly you can't tell what its discharge looked like. If anything, it looks more like the structure shown in the Robb patent.

I respectfully submit that there is no dovetailing of the type earlier mentioned by your Honor.

There is also left the question if a batching apparatus as testified to was used at that time, whether or not that use was experimental. The batch operators wouldn't know if it was experimental or not. Only its designer and fabricator could testify to what was in his mind at that time and whether it was satisfactory or not. But I would suggest that the defendants have shown there was some experimentation because the drawing you are looking at, Defendant's Exhibit A, has a date——

The Court: December 4, 1931.

Mr. Denny: December 4, 1931. Defendants also put into evidence their Exhibit H, and I presume that they intended it to show some relationship to the alleged anticipating structure they were talking about. It shows as late as April 13, 1933, changes were being made to that aggregate batcher. If these drawings are to be believed and are properly in evidence, I suggest that they as well prove that this structure was being used experimentally. Changes were made at least two years [615] after the date

alleged by defendants, and for that matter changes may have been made an additional two years later and the batcher would not be good as an anticipation.

If your Honor will also again refer to Defendant's Exhibits A and E, you will see that there is here shown what the defense identified as a tunnel which contained the operating mechanism for the cement batcher discharge gate, pointing to Exhibit A. This was also placed into Defendant's Exhibit E by the witness Cornett.

I point out it is rather interesting that the tunnel ended upon the same side as the drawing here, and that the witness said in his conclusion the aggregate still completely surrounded the cement.

Before you decide, your Honor, whether or not the aggregate in this structure could have completely surrounded the cement or not, I would like to read a portion of defendant's pretrial memorandum, page 14——

The Court: Just a minute. I am going to give you until 4:00 o'clock. You have got five minutes left.

Mr. Denny: I will be done if you will let me read it.

The Court: Go ahead and read it. I don't care how you use the five minutes, but that is all the time you are going to get. You have had over an hour.

Mr. Denny: I will read from defendant's pretrial memorandum as follows: [616]

“Defendant likewise will establish at the trial

that this claim has never been infringed. Defendant does not and never has built a cement batching apparatus wherein the discharge means are concentrically disposed in serving to produce commingling of the cement and coarser aggregate. Defendant's cementing apparatus consists of three hoppers positioned alongside of each other, the central hopper containing cement and being suspended from one scale, the other two hoppers containing aggregate material and being suspended from a second scale, in much the same manner as illustrated in the Robb patent No. 1,750,244. There is no concentric discharge. In this respect reference is made to Fig. 5 of the Johnson patent which shows a concentric discharge and shows what this language utilized in the claim means. It will be noted that the cement discharge is completely surrounded by the aggregate materials so that the cement discharge and aggregate discharge truly concentric. Defendant does not use this arrangement. In defendant's arrangement the aggregate flows along one stream, then a stream of cement, then a second stream of aggregate. There is no concentric discharge [617] and the functioning of defendant's device is the same as the prior art."

Well, your Honor, I submit that the evidence proved that the defendant was not right in his position here on the question of infringement, but if a device such as alleged here does not infringe, it does not anticipate. There are cases on that. Here if, because the aggregate does not surround the cement so as to produce a concentric discharge,

I would submit it couldn't be an anticipation on the basis of what is shown here alone.

Thank you, your Honor.

The Court: Before we proceed, Mr. Lyon, we have a criminal matter I would like to dispose of.

(Other court matters were taken up.)

The Court: Mr. Lyon, I will give you 30 minutes. The only thing I am interested in is the question of the plant in San Francisco and the admissibility of the blueprints.

Mr. Lyon: Your Honor, please, there is a very serious question whether or not there is any invention in this patent and I hate to confine myself to one defense at this time because I believe the other defenses are equally as good.

The only testimony in the record which would have any bearing whatsoever on this invention, as your Honor so aptly tagged it, when Mr. Wright was on the stand, was merely speculation. Never any test run to show that this plant did [618] what it is claimed to have done by the plaintiff.

The testimony of their own witness, Mr. Pearman, said that none of these intermingling or commingling things took place.

The testimony of Mr. Wisniski, who has been an expert in this field for many, many years and held very high and responsible jobs, said that this was all a bunch of nonsense, that this commingling or intermingling, or whatever happened, produced no useful result whatsoever, that it was only when you got the intermixing in the hopper that was placed

underneath that you got any useful action whatsoever.

I hate to confine myself to this one particular defense, and with your Honor's permission I would like to go into the others.

The Court: Go ahead and use the time any way you want.

Mr. Lyon: I will take up the question of prior use first, because that seems to be the one your Honor is most interested in.

The Court: You will admit, won't you, if there is any prior use, the patent is no good?

Mr. Lyon: That is correct.

The Court: Doesn't that end the case?

Mr. Lyon: As far as we are concerned, barring the question of their going up on appeal, and if they go up on appeal, I would like to have a decision that there is no invention on [619] this patent.

Mr. Bodinson, who is the president of the Bode Rock Company, testified that it was the policy of this company to make drawings of every construction they ever made. He testified it was the policy of this company to keep these drawings in a certain specified file as per job.

The plaintiff has made the argument that these were not kept in the regular course of business. I have a lot of difficulty understanding just precisely what we are talking about. Section 1732 specifies this.

Such documents are admissible if made in the regular course of business.



I don't think there is any question in this case that they were made in the regular course of business. That is the only testimony before this court. There is no other testimony whatsoever would suggest in any way that these have been——

The Court: Well, the question here is, supposing an engineering firm or a draftsman or an architect draws plans for a building. The building is built and then the plans are given over to the owner of the building and the owner of the building files them in his records. Who made the plans? They were made in the usual course of business as far as the architect was concerned, but were they also made in the regular course of business as far as the owner is concerned?

Mr. Lyon: Well, in this instance, your Honor, you will [620] remember the Bodison Gravel Company were the people who manufactured the plant and it was their record, not the owner of the plant, but the man who built the plant.

The Court: The record of the builder we have got here.

Mr. Lyon: That is correct, sir, of what his business transactions were. I don't see what other way a construction corporation can keep any records of anything that it does. I mean if those aren't records kept in the regular course of business, a construction organization doesn't have any records in the ordinary course of business.

There is one further point, your Honor, the plaintiff didn't touch on at all, the question of these job orders.

Mr. Bodinson testified in his organization as soon as the plans are made up they send out a job order to the department who is going to do the specific work.

The Court: Yes, I know, but I don't think the plaintiff is contesting very seriously that this plant wasn't built when you say it was built. They are contesting that the plant didn't contain what you said it contained. The job order is only piecemeal. It doesn't show the inner workings of the plant. The job order goes to establish the fact of when the building was built or the plant was built. It doesn't indicate what was inside the plant.

Mr. Lyon: I am convinced the plant was built in 1931. I want to make certain you are. [621]

The Court: I am, also. I have no question of that.

Mr. Lyon: As to the construction of this plant, we have the testimony of Mr. Murasko and Mr. Cornett. Mr. Cornett was busy operating this plant from 1933 until 1947. This is not the type of case the plaintiff tries to make out it was, where the testimony is, well, on the 23rd of August, 1934, I saw one of these. This isn't that type of situation. This is where a man day in and day out for 14 years worked at the plant. There is no question but what he was there. There is no evidence to the contrary at all.

Mr. Murasko was there from 1931 to 1942. That is 11 years he worked on this same plant. He ran it every day, or if he didn't run it, he was right

there while the other man was running it. No question but what the plant was there and these gentlemen were there for a minimum period of 11 years. This is not the type of situation they are talking about in the barbed wire case where they bring in a cattleman who says, "Yes, in October, 1923, I saw one of those on a fence."

That is not the kind of testimony we have here. We have testimony from men who were with this job for 10 or 15 years every day, and they saw this plant, operated this plant, ran it. They testified as to how that plant was constructed.

They testified there was a hopper for the aggregate material. There was a second hopper for the cement material, [622] suspended within this hopper.

Each hopper was suspended from separate scales.

I might remind your Honor that these claims, as far as claim 1 of the patent goes, it doesn't describe any of these details. There is nothing in that claim or in that patent that has anything to do with the formation of the discharge gate or any of that material. There was no question whatsoever that this structure contained a hopper within a hopper, each suspended from separate scales. That is all that is defined by claim 1.

The plaintiff has tried in many instances to try to build some inconsistency in the statements of these men. Remember Mr. Cornett was the white-haired gentleman who obviously was scared half to death when he was on the stand for fear he would do something, I don't know what. He was

a gentleman with modest education, a grammar school education, your Honor. He had been a plant operator all his life. He sat there and Mr. Sellers cross-examined him, I don't know how many minutes and hours went by while he kept asking him the same questions over and over and over again. Remember the trip he testified he took and Mr. Sellers would say, "Did you say that was in 1937?" And he would say, "No, correction, that was in 1936."

Then he would come back an hour later and say, "You said that was in 1937, didn't you?" And the witness would [623] say, "No, it was in 1936."

We had repeated efforts to try to break the man's story, to try to build some inconsistency into his story, none of which were successful.

In my mind there can't be any possible doubt that plant was there, it was there in 1931, and it was constructed with a hopper within a hopper suspended from separate scales. The witnesses have so testified.

Mr. Bodinson testified in 1946 or '47 when he was up there, it was so constructed. He could not testify how it was constructed in 1931. There is nothing to show the plant was changed in the whole course of that time. There were, of course, parts that wear out on a plant of this type and there was testimony of the defendant's other witnesses there might be replacement of parts.

But I believe the witnesses, all three of them, their testimony as to the construction of the plant leaves beyond any question that the vital elements

of the claim were in it, the question of a hopper within a hopper, each suspended from separate scales, and that is all that claim calls for, your Honor.

So we have this situation. We do not have an individual witness trying to testify as to an individual so-called prior use. We have Mr. Murasko, who testified that he operated this plant from 1931 to 1942. He testified as to the manner [624] in which the plant was constructed.

We have his testimony supported by that of a second witness, Mr. Cornett, who testified that he was working on that plant daily from 1933 until 1947.

We have that testimony corroborated by the drawings which show the construction of the device and show a hopper within a hopper construction. Plaintiff's Exhibit A shows that construction, your Honor, shows a hopper disposed within a hopper.

The central drawing right there shows just exactly that construction, just exactly in the manner it is shown in the charts which the plaintiff had prepared. It shows the accused structure.

The more difficult question in this case—well, not more difficult, but one which I think also needs some consideration, is the fact that this patent does not purport to claim as its invention a cement batching apparatus. I call your Honor's attention to the language of the first paragraph of the patent:

“Though the invention is susceptible of use in any connection where a number of different kinds of aggregate materials are being proportioned \* \* \*”

The patentee in that statement says, "I do not intend, I don't want this patent construed as limited to cement batching apparatus. This invention is susceptible of use in any type [625] of batching apparatus."

Claim 1 of the patent does not confine the definition of the invention to a batching apparatus—I mean to a cement batching apparatus. Pardon me. It says, "in a batching apparatus of the class described \* \* \*"

The patent endeavors to cover any and all forms of batching apparatus irrespective of whether it has to do with the particular cement problem or not. It is an attempt on the part of a patentee to monopolize this concept of placing one hopper within another hopper suspended from separate scales, irrespective of where it is used.

The Court of Appeals in the Ninth Circuit has, I think very aptly, disposed of this type of situation, where a patentee has claimed more than his invention, where he has tried to write a claim which is broader than what he has contributed to the art, and that is in *Winslow vs. Smith*, 108 U.S.P.Q. 25, where the Court of Appeals followed the decision of the Supreme Court in *Graver vs. Linde Air Products*.

You will recall the *Graver vs. Linde Air Products* case. That was a decision where in the District Court it was held that the patent was invalid because the claim called for silicates, and it was established at the trial only nine metallic silicates would operate and others would not.

The Court of Appeals reversed the District Court and said, "There is nothing in the patent that shows he intended [626] the word silicates as used in his claim as covering more than those that would work."

When the case went to the Supreme Court, the Supreme Court turned around and reversed the Court of Appeals.

"The court cannot rewrite or expand the claims of a patent. If a man overclaims an invention intentionally or unintentionally, it is the duty of the court to strike that claim down."

That was precisely the action taken in *Winslow vs. Smith*.

Your Honor, in any patent case the first question that must be answered is the question of whether there was an invention made. We can talk about everything else all day, but that is the first question you must decide.

When Mr. Sellers was presenting his case through the witness Wright, your Honor asked him, "What was the invention?"

Mr. Sellers' comment was that it was the concept of surrounding the cement with a shaft of aggregate.

Your Honor will recall the earlier Johnson patent 1,687,499. This patent is just as good prior art against the Johnson patent in suit as anybody else's.

This patent states, and this is what Johnson said some nine years earlier:

"Stated more specifically the invention aims [627] to provide a large hopper in which the aggregate

for the bath is stored and a smaller cement hopper having an outlet opening within said large hopper, the opening being closed by the aggregate initially fed into the large hopper whereby the cement flowing from the cement hopper will be surrounded by a layer of the aggregate and thereby held out of contact with the inner surface of the large hopper.”

That is the invention of Johnson patent No. 1,687,499, not the patent in suit, yet when Mr. Sellers is asked, “What is the invention in this patent,” he comes back to this very same paragraph and says this is also the invention of the patent in suit.

Your Honor, he was issued one patent covering that. He can't have a second. This one has expired.

It is merely an attempt to monopolize again that which he had gotten a patent on earlier.

The only thing Mr. Sellers could point to as new was the concept of surrounding the cement with the aggregate. His prior patent taught that some nine years before. There is no invention involved in this at all, your Honor.

When you asked the witness Mr. Wright what benefits he received out of this patent structure, he said, “Well, you get an intermingling.”

I asked him myself, “Do you get an intermingling if [628] your discharges aren't specifically related to one another?”

He said, “No.”

I asked the witness Pearman, “With the construction of a hopper within a hopper, do you get any kind of a”—I misspoke myself. I didn't mean



Mr. Pearman. I meant Mr. Pinne, I believe it was, whatever the name was.

Mr. Sellers: Pinne.

Mr. Lyon: I asked him, "What is it that gets this result, what is it that is supposedly better about this?"

He said, "If one discharge is concentric with the other discharge and if it is raised above it, then you get it, but if you don't have that relationship, then you don't get any of this so-called intermingling or commingling."

This relationship is not defined in claim 1. There is nothing in there about the discharge being concentric. There is nothing in there about one of them being positioned anywhere with respect to the other.

So that the whole plaintiff's case has been directed to the concept of obtaining this intermingling or commingling of the cement with the aggregate and yet that claim, claim 1, does not even mention it. There is nothing in that.

Your Honor is not permitted by the law to read into a claim any kind of a limit. You are not permitted by the statute or by the decisions of the Supreme Court to vary one bit the language that is in those claims. [629]

I think the best example of what is meant by that is presented by our Ninth Circuit Court of Appeals in *D. & H. Electric Co. vs. M. Stevens Manufacturing Company*, in 108 U.S.P.Q. 27. The claim in suit had reference to two items, that they were substantially at right angles to one another. The defendant in relating the same two items used

from 85 to 89 degrees. 90 degrees is right angles. They used 89.

The Court of Appeals said that is not substantially right angles. The claim says it has to be substantially right angles and that is not. It is a degree off. So there is no infringement of the claim.

I think the same situation is pertinent at the present time. This claim relates to a hopper within a hopper suspended from separate scales and nothing else. The claim does not define an invention, if there is one at all, your Honor.

We had a lot of conflicting testimony here as to whether or not there was any definite commingling or intermingling of the two ingredients.

When I got around to ask Mr. Wright on what he based his opinion, he voiced complete ignorance of the basic laws of physics as to free falling bodies. I couldn't intelligently interrogate the man. He didn't know whether heavier bodies fell faster or slower than light bodies. He did not know whether or not something made something else move sideways when it [630] was falling. Mr. Wright's testimony was sheer speculation, your Honor. The plaintiff never once in this case tried to establish any test that was ever taken to substantiate what was supposed to have been the result obtained.

Mr. Wisniski, who has been in the business since 1935, has held high important positions with the federal government, has been in cement work since he was out of college, testified you cannot anticipate what goes on in one of these things, that you have

got to run a test. He said, without running a test, I cannot tell you whether there is any intermingling or commingling or anything else.

Mr. Roger Pine was the draftsman who made the drawings. When I asked him on the stand, he said, "I can't tell you what that gate looks like, because when I got down under that plant, I couldn't see it."

In other words, your Honor, there is nothing here that would establish any of the so-called new, startling or unusual results which the plaintiff claims. There isn't one bit of proof to establish any one of them. It was merely speculation of witnesses who were testifying as paid experts for the plaintiff. When I asked the witness on what theory, he divorced himself from any knowledge of any of the theories by which this could result.

Now, after your Honor has covered the question of whether or not there is an invention, the second question that [631] must be answered in a patent case is whether or not the claimed device is that invention. I believe I have previously discussed that. The test has been fully set forth in the A. & P. case as to what constitutes a patentable invention. I have cited in my pretrial memorandum all the latest cases since that time. Your Honor, is probably familiar with some of them; as a matter of fact, probably familiar with all of them.

The Court: May I ask you a question?

Mr. Lyon: Yes, sir.

The Court: If I file a claim for a patent for

something that is already in the public domain, do I get a valid patent?

Mr. Lyon: No, sir. The Patent Office might issue it.

The Court: The patent is invalid; isn't it?

Mr. Lyon: That is correct, sir.

The Court: In this case if I find that the plant in San Francisco was built as testified to by the witnesses, that it is a replica of the plant that the plaintiff claims a patent on, isn't the patent invalid?

Mr. Lyon: That is correct, sir. That fully disposes of the validity of the patent. But I also suggest there is a second question, and that is the lack of invention in the first instance.

The Court: Well, the last time I tried a patent case and held it lacked invention, I was reversed, so I want to make sure I know about what is invention. I followed the [632] Supreme Court, but the Circuit said I didn't follow it right.

Mr. Lyon: Well, let me refresh your memory once again. Remember the Kwikset Lock case vs. Hilgren.

The Court: Yes; I remember that.

Mr. Lyon: Your Honor, this is one of the most difficult fields of patent law, to ascertain when and when not an invention is involved, and a combination of mechanical elements. The Supreme Court has never, nor has any other text writer or court, ever evolved a definition that would help define invention. They have evolved a number of definitions if you feel there is no invention.

The one that they seem to rely upon most heavily now is probably summarized by the comment of the Ninth Circuit Court of Appeals. If your Honor can put the elements of this claim together and have two plus two equal five, you have got invention, but if two plus two comes out to equal four, you have got merely an old, exhausted combination of elements. In other words, let us put all these individual elements together——

The Court: Mr. Lyon, at the time we were trying this case and at the time you were introducing your testimony as to the plant that was built in San Francisco, I said if I believe the testimony of this witness, here was a plant built practically identical to the plant you claim to have a patent on—I was talking to the plaintiff's attorney. I haven't [633] changed my mind in regard to that manner.

Then again I said it seems to me, Mr. Sellers, if I am convinced that here was a plant that was built in San Francisco in 1931 practically the same as the plant described in your patent, which was filed in 1937, if I am convinced that there was prior use prior to the obtaining or the filing of this patent, it would seem it would be very unjust at this date to award damages on a patent that I am convinced was illegal and void from the very beginning.

That was my opinion then when I was hearing the witness, and it is still my opinion. It seems to me that the claims of the patent can be read upon the plant that was built in San Francisco.

Mr. Lyon: I agree with your Honor completely. There is no question in my mind.

The Court: So, I don't think it is necessary to extend this matter any further. I am going to find that the plant in San Francisco was built prior to the date of the application for the patent in suit, and that the claims of the patent in suit read upon the claims of the plant in San Francisco, and because of that the patent is illegal and void.

Mr. Sellers: May I ask, your Honor, is your Honor basing that solely upon the testimony of the witnesses Murasko and Cornett, or are you——

The Court: I am basing it upon the testimony of all the [634] witnesses, all the evidence in the case, not just one witness.

Mr. Sellers: May I ask, are you including in that the evidence produced by Mr. Bodinson under the business records?

The Court: I am including all of the evidence that was introduced, all of it.

Mr. Sellers: Thank you, your Honor.

The Court: I am satisfied that my ruling is correct relative to the introduction of the drawings. You have a perfect right to test my judgment in that case. I have no objection, if you want to appeal. It is perfectly all right with me. If the Circuit wants to reverse, it is perfectly all right with me.

Also, as I indicated in my statement the other day, I will not award costs or attorney's fees to either side. Each side will bear their own costs. Now, I may say that that only applies to this trial. If there is an appeal and a reversal and it comes

back, then I will consider the question of awarding attorneys' fees and costs on a new trial and the appeal, not upon the old trial.

As far as I am concerned, from this time on there will be no costs and no attorney's fees, but I have an open mind if anything happens in the future. You understand, do you?

So if there is an appeal and if counsel feels that—and I am satisfied he feels that an appeal should be taken if [635] his client will agree an appeal should be taken, and there is a reversal and the case comes back, then I will consider costs and attorneys' fees relative to the new litigation from this time onward. But my order relative to costs and attorneys' fees stops with the filing of the judgment.

Court will stand in recess.

Mr. Sellers: Your Honor, may I ask before we stop, does that apply to claim 5, too? You remember there is not one iota of evidence relating to anticipation of claim 5. Claim 1, yes; but the plant in San Francisco was never alleged to have circular water means.

The Court: I am satisfied it applies to the entire suit.

Now, Mr. Lyon, will you prepare the findings of fact according to the rules?

Mr. Lyon: Yes, sir.

The Court: All right. Court will stand in recess until 10:00 o'clock tomorrow morning.

[Endorsed]: Filed June 28, 1956. [636]

[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 97, inclusive, contain the original

Complaint;

Answer;

Plaintiff's Pre-trial Memorandum;

Motion of Attorneys for Defendant to Withdraw from the Case;

Affidavit of H. Calvin White;

Order re Motion of Attorneys for Defendant to Withdraw from Case;

Notice Under Title 35 U.S.C. 282;

Notice of Hearing;

Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Continuance;

Affidavit in Support of Memorandum of Points and Authorities in Opposition to Defendant's Motion for Continuance;

Defendant's Pretrial Memorandum;

Reply to Defendant's Pretrial Memorandum;

Findings of Fact, Conclusions of Law and Judgment;

Notice of Appeal;



Statement of Points Upon Which Plaintiff  
Appellant Intends to Rely;

Plaintiff's Designation of Contents of Record  
on Appeal;

Order for Extension of Time to Docket  
Record on Appeal;

Order by Stipulation that the Reporter's  
Transcript of Proceedings May Be Corrected  
by Hand-Written Insertions;

which, together with 5 volumes of reporter's transcript of proceedings and plaintiff's exhibits 1 to 20, inclusive, and defendant's exhibits A to Q, inclusive, except C & D which were withdrawn.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellants.

Witness my hand and seal of the said District Court this 30th day of August, 1956.

[Seal]

JOHN A. CHILDRESS,  
Clerk;

By /s/ CHARLES E. JONES,  
Deputy.

[Endorsed]: No. 15249. United States Court of Appeals for the Ninth Circuit. C. S. Johnson Company, a corporation, Appellant, vs. Merle W. Stromberg, doing business as California Batching Equipment Co., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 31, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

No. 15249

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

C. S. JOHNSON COMPANY,

*Plaintiff-Appellant,*

*vs.*

MERLE W. STROMBERG, dba CALIFORNIA BATCHING  
EQUIPMENT Co., DOE I, DOE II, and DOE III,

*Defendant-Appellee.*

---

## OPENING BRIEF OF PLAINTIFF-APPELLANT.

---

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FILED

DEC 12 1956

PAUL P. O'BRIEN, CLERK



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No. 15249  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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C. S. JOHNSON COMPANY,

*Plaintiff-Appellant,*

*vs.*

MERLE W. STROMBERG, dba CALIFORNIA BATCHING  
EQUIPMENT CO., DOE I, DOE II, and DOE III,

*Defendant-Appellee.*

---

**OPENING BRIEF OF PLAINTIFF-APPELLANT.**

---

**JURISDICTION.**

The jurisdiction of the District Court is alleged in Paragraph I of the Complaint [Tr. p. 3], as follows:

“This action arises under the patent laws of the United States of America and this Court has jurisdiction thereof under 28 U. S. C. 1338(a).”

The jurisdiction of the District Court is admitted in Paragraph I of the Answer [Tr. p. 10], as follows:

“Answering paragraph I of the Complaint, Defendant admits that this action arises under the patent laws of the United States and that this Court has jurisdiction thereof.”

The jurisdiction of the District Court is also established by Finding of Fact No. 3 [Tr. p. 78].

This Honorable Court of Appeals has jurisdiction to review the final judgment of the District Court on appeal, according to 28 U. S. C. 1291.

## STATEMENT OF FACTS.

### The Case.

This is a suit for infringement of United States Letters Patent 2,138,172 [Tr. p. 42] for a Batching Apparatus, invented by Charles S. Johnson. The patent is based on an application filed February 10, 1937, and which issued on November 29, 1938. The patent expired on November 29, 1955.

By stipulation [Tr. pp. 26, 27, 148], it was agreed that the aggregate and cement weigh hopper and scale portions of the Stanton Ready Mix plant at Stanton, California, which was manufactured and sold by Defendant [Tr. p. 242], were typical of such portions of substantially all of the other plants manufactured and sold by Defendant and of the two-scale, central cement weigh type described in the patent in suit. The trial accordingly proceeded with primary relation to the Stanton plant, which is illustrated in Plaintiff's Exhibits 12, 13 and 14 and on pages 39-41 of the Transcript.

By stipulation [Tr. pp. 29, 151], it was also agreed that the trial would proceed on the basis of claims 1 and 5 only, and that a count for unfair competition would not be urged. Claim 1, shown in Plaintiff's Exhibit 15, is a broad claim which covers not only the Stanton plant but the other plants referred to in the preceding paragraph. Claim 5, shown in Plaintiff's Exhibit 17, is a much more specific claim which covers the Stanton plant and only one of Defendant's other plants.

From the above it will be understood that claim 1 must be held valid and infringed if Plaintiff is to be given substantial relief. The upholding of claim 5, although also much desired by Plaintiff, will result in greatly diminished relief since claim 5 covers two plants only.

Claims 1 and 5 were held invalid by the trial court, solely on the ground of an alleged prior public use at a batching plant constructed and operated by strangers to the present action at 235 Alabama Street, San Francisco, California [Findings of Fact and Conclusions of Law, Tr. pp. 78-84].

### **The Parties.**

Plaintiff and Defendant are competitors engaged in the business of manufacturing batching plants for sale to purchasers, such as ready-mix concrete companies, who use the plants to batch (proportion) concrete. Plaintiff and Defendant are manufacturers and fabricators only, and do not themselves engage in concrete batching operations.

Plaintiff is a corporation having a principal place of business at Champaign, Illinois. Defendant is an individual doing business in Los Angeles under the fictitious name California Batching Equipment Co.

### **The Art to Which the Invention Relates.**

The invention relates to the concrete manufacturing art.

Concrete is comprised of a mixture of gravel, sand, water and cement. Good concrete comes from a correct proportioning of the ingredients and from a thorough dispersal of the cement so that every particle of gravel and sand, called aggregates, is coated with cement when put into place in a form or the like.

Particularly during the past two decades plants, commonly called batch plants, have been used to proportion the concrete ingredients in batches of the proper weight for introduction into a concrete mixer. The mixer is commonly mounted on a truck, called a "transit-mix" or "ready-mix" truck, but is also frequently located blocks

or miles from the batch plant as for example a road paving job. In the latter type of operation, known as "dry batching," the batched ingredients are hauled dry in open top dump trucks from the batch plant to the paving mixer at the site.

Although the Trial Court did not at first appreciate the fact [Tr. p. 191], it is emphasized that the commercial concrete batching art bears no relation to small home-style concrete mixing operations. A batching plant of the type here in question will turn out many tons of materials [Tr. p. 116] in a matter of seconds. One company having twenty-three (23) batch plants [Tr. p. 389] turns out fourteen thousand (14,000) *tons* of concrete in an ordinary working day [Tr. p. 412], or an average of over six hundred (600) tons per day per plant.

The concrete batching art is much more exacting and difficult than is commonly appreciated. The aggregates must be prepared, graded, analyzed and stored with the utmost care [Tr. pp. 111, 169]. The cement must be of the proper chemical analysis [Tr. p. 169]. The proportions of the ingredients are designed by skilled engineers, and must be measured out by the batch plant with a high degree of accuracy [Tr. pp. 96, 117] or disastrous consequences might follow.

The cement is the vital and most expensive ingredient in the concrete [Tr. pp. 379, 444], and is also by far the most difficult to handle.

The batching apparatus is the most important part of a batching plant. The quality and quantity of the output of the plant depend upon the ability of its batching apparatus to accurately and quickly proportion the concrete ingredients, and upon the manner in which the ingredients are discharged into the mixer or other receptacle.

That part of the batching apparatus in which the aggregates are weighed is called the aggregate hopper. The cement is weighed in the cement hopper.

## The Invention.

### Pre-mixing.

Johnson's primary contribution to the concrete batching art, as set forth in the patent in suit, may be summarized as follows:

JOHNSON TAUGHT THE ART HOW TO MAKE A BATCHING APPARATUS WHICH WOULD PRE-MIX OR INTERMINGLE THE CONCRETE INGREDIENTS AS IT DISCHARGED THEM AND BEFORE THEIR INTRODUCTION INTO THE WAITING TRUCK OR MIXER, without sacrificing the great advantage of separate weighing of the cement [Specification of the patent in suit, Tr. p. 42, particularly at p. 1, col. 2, lines 14-29, and p. 3, col. 1, lines 13-41]. That pre-mixing is of tremendous importance and value cannot be seriously questioned [Tr. pp. 129-131, 400, 405, 434, 440]. The importance of weighing the cement completely separately from the aggregate, in order to achieve accuracy, is also beyond question [Tr. pp. 97, 114, 257, 344, 444].

The apparatus invented by Johnson, while effecting pre-mixing and maintaining completely separate cement weighing, also effects many other desirable results. Some of these results, and some of the problems solved by pre-mixing, will be set forth in the following paragraphs.

(a) JOHNSON SOLVED AIR POLLUTION PROBLEMS CREATED BY CONCRETE BATCHING OPERATIONS. Cement is highly subject to being blown away by the wind, which has the undesirable effect of polluting the air with cement dust. This was stated by the witness Pinne, who is superintendent of the largest rock company west of the Mississippi [Tr. pp. 389,

391], to be a big problem [Tr. p. 402] with relation to plants *other* than the Johnson central cement flow type. The problem is not only present at the batching plant, but in trucks as a result of the so-called "dry batching" operations [Tr. p. 399] where the ingredients are hauled dry, in open trucks, from the batch plant to a mixer which may be miles away. By surrounding the discharging cement with aggregate and thus protecting it from the wind [Tr. p. 187] and by causing the aggregates to gravitate from their weigh hopper around and into the cement gravitating from its weigh hopper so as to cause the pre-mixing or intermingling of the ingredients [Tr. pp. 129, 131, 360, 402-403, 457], dusting is greatly minimized and substantial amounts of cement are prevented from blowing out of the open-topped dry batch trucks [Tr. pp. 381, 382, 400, 402, 404].

(b) JOHNSON SOLVED THE PROBLEM OF GETTING THE INGREDIENTS INTO THE FINAL MIXER IN SUCH CONDITION THAT THEY WILL MIX PROPERLY. The two biggest factors here are "balling" of the cement [Tr. pp. 130, 309, 401, 404], and "gumming" of the cement on the mixer blades or on the interior wall of the mixer drum [Tr. pp. 185, 256, 434, 440]. Defendant's own expert testified that these problems are solved by pre-mixing the ingredients [Tr. pp. 434, 439, 440], which is just what Johnson has done. Such pre-mixing is even more important with modern ready-mix trucks than it was formerly [Tr. p. 405]. The present invention not only results in pre-mixing, however, but it *insures* that the cement will never enter the mixer ahead of the aggregate (since the aggregate discharge gate is necessarily beneath the cement discharge gate) and ball or gum with the

rinse water which is always present in a mixer [Tr. p. 404]. As the result, it was testified that Johnson-type plants do not cause balling or gumming [Tr. pp. 321-322], although balling has been so severe with other plants as to necessitate redesign of the mixer blades [Tr. pp. 327, 328].

(c) JOHNSON SOLVED THE PROBLEM OF MIXING CONCRETE WITH GREATER SPEED. Defendant's own expert testified that the time required for mixing is of consequence and may be of the essence [Tr. pp. 436, 454, 455], and this was corroborated by other witnesses [Tr. pp. 300, 407]. The patented construction, because it causes pre-mixing of the ingredients, results in a shorter period of time required for final mixing [Tr. pp. 130, 256, 298, 406, 440].

(d) JOHNSON SOLVED THE PROBLEM OF PRE-SHRINKING THE INGREDIENTS BEFORE THEIR INTRODUCTION INTO THE MIXER TRUCK. It takes 47 cubic feet of loose aggregate and cement to make 27 cubic feet of concrete [Tr. p. 119]. A much bigger payload will therefore result, for a mix truck of a given volume, if the smaller ingredients are caused to fill the voids in the larger ingredients [Tr. p. 10] *before* introduction into the mix truck. This is called pre-shrinking, and is a necessary consequence of the pre-mixing effected with the present invention. Pre-shrinking is also caused by the introduction and pre-mixing of water from the surrounding water ring [Tr. pp. 109, 110, 119, 120, 204].

(e) JOHNSON SOLVED THE PROBLEM OF CORRECTLY INTRODUCING WATER INTO THE MIXER. Defendant's own expert testified that the introduction of water is "very critical" [Tr. p. 451]. Johnson's solution to this critical problem was to surround the falling

shaft of commingled cement and aggregate with a ring or tube of angularly-inwardly directed water. It is emphasized that particularly in "wet-batching" operations the water introduction means [Patent specification, p. 3, col. 2, lines 16-47] co-operates [Tr. p. 204] with the discharge means, which effect cement-aggregate commingling in a falling shaft-like stream, to provide the desired pre-mixing and pre-shrinkage of the ingredients, and to prevent gumming of the cement on certain parts of the batching plant.

(f) JOHNSON SOLVED THE PROBLEM OF GETTING ALL OF THE CEMENT FROM THE WEIGH MEANS TO THE FINAL MIXER. Cement is a peculiar material. It tends, even when dry, to hang up wherever it can [Tr. pp. 99, 437, 452] instead of flowing where desired. It sticks or "gums" at any point where moisture is present [Tr. p. 399]. Furthermore, as previously stated, it is subject to being blown away any time it is exposed to the wind [Tr. pp. 128, 129]. Any of these three factors may operate to prevent *all* of the vital cement from reaching the final mixer, which will result in incorrect proportioning *even if the weighing operation is perfectly accurate*. Johnson's solution to all three of these problems was (1) to locate the cement weigh hopper directly above the delivery point so that a short vertical flow path [Tr. pp. 100, 452] and consequent minimized hanging up would result, and (2) to surround and intermingle the discharging cement with the aggregate and thus not only wipe surfaces clean of cement [Tr. p. 453] and minimize gumming, but also protect the cement from wind loss and dusting [Tr. pp. 187, 381, 382, 402].



(g) JOHNSON SOLVED THE PROBLEM OF REDUCING PLANT HEIGHT AND SIZE. A low batching plant, and a narrow one, can be constructed at minimum cost [Tr. p. 374]. Defendant himself admits that the plant size is a minimum [Tr. p. 377] when the cement is located in the center, as in the patented construction, instead of off to one side.

The patented construction has given Plaintiff great commercial success in a field where, obviously, purchasers buy with care and as the result of performance and quality instead of mere advertising and sales promotion. Since Plaintiff became active in the western states [Tr. p. 281] it has sold therein plants of the type covered by the patent and representing about 45% of the available business [Tr. p. 282]. The patented construction has not been employed by the major competitors of the Plaintiff [Tr. p. 284]. This is a strong indication that the patent has been well respected since, even after two decades, the claimed construction is still the ideal—the ultimate one and the one most desired in its field [Tr. pp. 133, 413].

It is believed that the above will convince this Honorable Court that Johnson made as great an invention as it is possible to make in the field of concrete batching. Here is a case where the whole clearly exceeds the sum of its parts to provide numerous great advantages which are not present in the elements taken alone. There was nothing obvious about freely and independently mounting a weigh hopper within another weigh hopper as Johnson has done—it went directly contrary to the belief in the art that a weigh hopper is intended to contain ingredients and *not* another weigh hopper.

### **The Alleged Anticipations.**

The patents and publications cited in the answer [Tr. p. 13], and in a subsequent notice under 35 U. S. C. 282 [Tr. p. 46], are to be found in Defendant's Exhibit B. Although Defendant even went so far as to cite a seed planter (Patent 1,289,120) as an anticipation, in no reference (relating to either analogous or non-analogous art) is there disclosed or suggested either a hopper movably mounted within another hopper, or the combination thereof with a water ring. In fact, nowhere in the record save in Johnson's patent is there disclosed a water ring for a concrete batching apparatus or anything comparable thereto, or a suggestion that the cement and aggregates in a concrete weigh batcher be pre-mixed or intermingled as they are discharged from the batcher.

The only prior art touched upon by the Defendant at the trial was Johnson's earlier patent No. 1,687,499, and another file reference, Robb patent No. 1,750,244 [Tr. pp. 171 *et seq.*, 232 *et seq.*].

Testimony relating to the alleged prior public use at the Alabama Street plant is to be found on pages 472-598 of the Transcript. Defendant's documentary evidence in support of such use comprises Defendant's Exhibits A and F-P inclusive.

### **Summary of Events Prior to and During Trial.**

Because of an important question concerning the failure by Defendant to give Plaintiff notice relative to the Alabama Street plant, as required by 35 U. S. C. 282, this Summary and the Transcript of Record are necessarily unusually complete relative to activities prior to trial.

The present action was filed on August 25, 1954 (fifteen months before the patent expired), it having been Plaintiff's desire to obtain, in an early trial, not only

damages but also an injunction against Defendant. Plaintiff's desire for an early trial and injunction will be readily appreciated when it is understood that batching plants cost from fifteen to seventy-five thousand dollars [Tr. p. 283].

Plaintiff was thwarted, in its attempt to obtain an early trial and thus an injunction substantially before expiration of the patent, because of difficulty in getting the case on calendar and because of a long postponement of the trial date. Although Plaintiff did its best to obtain an early trial date, the case was originally set for trial on July 25, 1955, or not until eleven months after filing of the action. Pursuant to local Rule 12 of the United States District Court for the Southern District of California, Plaintiff filed its trial memorandum [Tr. p. 16] in the Judge's chambers on July 20, 1955, and was completely ready for trial on the specified date. Defendant, however, filed no memorandum at that time or until many months later [Tr. pp. 53-75].

Because of the fact that a preceding case on the Court's calendar lasted longer than expected, the present case was crowded off calendar and did not finally come to trial until March 13, 1956, by which time the patent in suit had expired. The relief sought both at the trial and in this Court, therefore, is damages for infringement which took place prior to expiration of the patent, Plaintiff's demand for an injunction having become moot.

Not only did Defendant fail to file a trial memorandum prior to the original trial date of July 25, 1955, but he continued for a long period of time thereafter to fail to prepare for trial. This failure was so palpable that his then attorney, H. Calvin White, Esq., was forced to withdraw from the case with the consent of the Court [Tr. pp. 43-46].

On December 8, 1955, several months after Mr. White's withdrawal, Plaintiff's attorney William D. Sellers, Esq., received a telephone call from R. Douglas Lyon, Esq., indicating that he had been retained by Defendant to try this case [Tr. p. 50]. Mr. Lyon filed, on February 10, 1956, a notice under 35 U. S. C. 282 [Tr. p. 46], in which certain patents were listed as anticipations. Mr. Lyon thereafter (February 24, 1956) filed a Motion for Continuance [Tr. p. 47], based on certain possible prior public uses [Tr. p. 48]. This motion was opposed by Plaintiff [Tr. p. 49], and was denied. Neither the patents cited in the notice under 35 U. S. C. 282, nor the possible prior public uses alleged in support of the motion for continuance, were relied upon by Defendant at the trial.

The trial began on March 13, 1956. The first three days of the trial [Tr. pp. 90-471] were devoted to testimony by expert and other witnesses, concerning the questions of infringement and of invention over prior patents (particularly the Johnson Patent No. 1,687,499 and Robb Patent No. 1,750,244) cited as anticipations. However, during the first day of trial [Tr. p. 157], Mr. Lyon, for the first time, make reference to the alleged prior public use at the Alabama Street plant, which presents a primary question before this Honorable Court on appeal. After a protracted discussion [Tr. pp. 157-166], the Court indicated [Tr. p. 166] that it would permit testimony concerning the Alabama Street plant.

Such evidence was brought in on the fourth day of trial [Tr. pp. 472-599], just three days after Plaintiff first heard about it. Plaintiff's motion to strike the evidence, based upon 35 U. S. C. 282, was denied [Tr. pp. 495-503].

The trial court recessed the case until April 23, 1956, at which time final arguments were held [Tr. pp. 604-650].

## SPECIFICATION OF ERRORS.

1. The District Court erred in holding claims 1 and 5 of Johnson Patent 2,138,172 invalid and void.

2. The District Court erred in holding that a prior public use of the invention defined by claims 1 and 5 of Patent 2,138,172 more than two years prior to the filing date of said patent has been established, and in holding that said claims 1 and 5 fail to define any invention over such prior public use.

3. The District Court erred in admitting into evidence, under 28 U. S. C. 1732, or any other law or rule, Defendant's Exhibits A, F, G, H, I, J, K, L, M, N, O and P, comprising photostats of engineering drawings and shop orders allegedly relating to a concrete batching apparatus allegedly constructed and operated at 235 Alabama Street, San Francisco, California. Such exhibits were admitted at pages 554, 561, 562, 564-566 and 571-577 of the Transcript, and were objected to by Plaintiff on the following grounds:

(a) That the exhibits are hearsay, and the witness Bodinson, called in support of such exhibits, was a mere youth at the time of the making of such exhibits, and had no knowledge of their making [Tr. pp. 550, 552, 554]. A representative objection is as follows [Tr. p. 554]:

"Mr. Sellers: I object, your Honor. There has been no showing that he was present when the drawing was made. There has been no showing he knows it was made to scale, there has been no showing he knows it was accurate. He is looking at a drawing in order to do this. It is a matter of opinion. I move the answer be stricken."

(b) That the witness Bodinson was in no position to know the policy of the company at the time of the making of the exhibits, and thus could not know if they were made in the regular course of business [Tr. pp. 550, 551, 553, 570]. A representative objection is as follows [Tr. p. 550]:

“Mr. Sellers: Your Honor, I object to that. He didn’t say he saw him do that. There has been no basis for saying he knew he drew it.

The Court: Aren’t these documents admissible under the document rule? I think I read it to you the other day. All in the world you have to establish is that you keep a written memorandum, it is customary to keep a written memorandum in your files, and it speaks for itself. He has testified that they keep the drawings. He doesn’t have to testify he knows them. He doesn’t have to testify he knows anything about the drawing.

Mr. Sellers: He testified the company has kept them. He said he started to work when he was 16 or 17, but had nothing to do with them at that time and he was in no position to know the policy of the company at that time.

The Court: He doesn’t have to show the policy of the company.

Mr. Sellers: Well, your Honor, he is president now and he can state what the policy has been since he has been president, but how can he state the policy prior to that time in the absence of a showing that he knew it?”

(c) That the exhibits were secondary evidence, and Plaintiff had no opportunity for verification [Tr. p. 555].

Further objections to the admission of these exhibits were made by Plaintiff at pages 474, 556, 561, 562, 563, 565, 566, 567, 570, 571, 572, 574 and 575 of the Transcript.

4. The District Court erred in admitting any evidence relative to prior public use of the invention defined by claims 1 or 5 of Patent 2,137,172, and particularly relative to any plant located at 235 Alabama Street, San Francisco, California, despite the failure of Defendant to comply with the provisions of 35 U. S. C. 282. Such evidence comprised the testimony of the witnesses Murasko, Cornett and Bodinson, reported at pages 472 to 598 of the Transcript, and also comprised the exhibits referred to in the preceding paragraph, No. 13. It was objected to, and was the subject of a motion to strike, on the ground of no prior notice under 35 U. S. C. 282, at pages 162-166, 473 and 495-503 of the Transcript. A representative objection is as follows [Tr. p. 473]:

“Mr. Sellers: Your Honor, I should like to object to this entire line of testimony for the reasons we have previously discussed. There has been no notice.”

5. The District Court erred in finding that the evidence, establishes the existence, construction, or mode of operation of an apparatus at 235 Alabama Street, San Francisco, California, prior to February 10, 1935, and more than two years prior to filing of patent application Serial No. 125,167, which matured into United States Letters Patent 2,138,172.

6. The District Court erred in finding that the existence, construction, or mode of operation of an apparatus at 235 Alabama Street, San Francisco, California, was conclusively established beyond a reasonable doubt

by the oral testimony of each of the witnesses Vernon Murasko, E. F. Cornett and Fred W. Bodinson.

7. The District Court erred in finding that the existence, construction, or mode of operation of an apparatus at 235 Alabama Street, San Francisco, California, was conclusively established and fully corroborated by the documentary evidence Exhibits A, F, G, H, I, J, K, L, M, N, O and P.

8. The District Court erred in finding that the elements of claim 1 of United States Letters Patent 2,138,172 were contained in an apparatus at 235 Alabama Street, San Francisco, California, prior to February 10, 1935, and more than two years prior to the filing of patent application Serial No. 125,167, which matured into United States Letters Patent 2,138,172, and in finding that the elements of said apparatus at 235 Alabama Street, San Francisco, California, functioned together with the same mode of operation to produce the same result as the apparatus defined by claim 1 of the United States Letters Patent 2,138,172.

9. The District Court erred in finding that an apparatus at 235 Alabama Street, San Francisco, California, prior to February 10, 1935, and more than two years prior to the filing of patent application Serial No. 125,167, which matured into United States Letters Patent 2,138,172, contained all of the elements of claim 5 of United States Letters Patent 2,138,172, excepting for "instrumentalities to supply water to the flowing shaft of aggregates in a tubular stream surrounding said aggregates and flowing into same at an angle thereto," and in find-



ing that such elements functioned together with the same mode of operation to produce the same result as the apparatus defined by claim 1 of United States Letters Patent 2,138,172.

10. The District Court erred in finding that the addition of "instrumentalities to supply water to the flowing shaft of aggregates in a tubular stream surrounding said aggregates and flowing into same at any angle thereto" to the elements allegedly present in the apparatus at 235 Alabama Street, San Francisco, California, would have been obvious at the time to a person having ordinary skill in the art, and did not involve invention.

11. The District Court erred in giving full credence to the testimony of each of the witnesses Vernon Murasko, E. F. Cornett and Fred W. Bodinson.

12. The District Court erred in finding that claims 1 and 5 of United States Letters Patent 2,138,172 fail to define any invention not embodied in a batching apparatus at 235 Alabama Street, San Francisco, California.

13. The District Court erred in finding that prior to February 10, 1935, and more than two years prior to the filing of patent application Serial No. 125,167, which matured into United States Letters Patent 2,138,172, there was constructed and operated publicly, openly and for commercial purposes at 235 Alabama Street, San Francisco, California, a batching apparatus characterized by a main hopper and an auxiliary hopper disposed within the main hopper with separate weighing mechanisms for each hopper.

14. The District Court erred in failing to find that the invention defined in United States Letters Patent 2,138,172 enjoyed great commercial success, and that the same is evidence of invention in the patented construction.

15. The District Court erred in failing to find that claim 1 of United States Letters Patent 2,138,172 is valid and infringed by Defendant.

16. The District Court erred in failing to find that claim 5 of United States Letters Patent 2,138,172 is valid and infringed by Defendant.

17. Findings of Fact 7-24, inclusive [Tr. pp. 79-83], are erroneous because:

(a) They were based on evidence not noticed under 35 U. S. C. 282, and admitted as the result of and abuse of discretion by the Trial Court.

(b) They were based on hearsay documentary evidence not properly admitted under 28 U. S. C. 1732(a) or any other law or rule.

(c) They were allegedly supported by conflicting and unreliable oral testimony.

(d) They relate to an apparatus which was uncertain and non-anticipatory in construction and operation, not proved beyond a reasonable doubt, not publicly and openly operated, and not clearly non-experimental.

18. Conclusions of Law I, II and III [Tr. p. 84] are erroneous for the reasons set forth in the preceding paragraph, No. 17.

## ARGUMENT.

### POINT I.

The Trial Court Erred in Finding the Evidence on the Apparatus at 235 Alabama Street, San Francisco, California, to Be Such, as a Matter of Law, as to Invalidate Claims 1 and 5 of Johnson Patent No. 2,138,172.

#### The Claims in Suit.

As hereinbefore pointed out, Johnson taught the world how to make a concrete batching apparatus which *pre-mixed or intermingled* the cement and aggregates as they were discharged, *substantially eliminated dusting, reduced gumming, reduced mixing time, pre-shrunk* the batch, and maintained *accuracy* of weighing.

In his patent 2,138,172, Johnson claimed his invention in the light of the concrete batching art then existing (This Brief, pp. 3-5).

In determining whether claims 1 and 5 have been anticipated by the evidence in the record Plaintiff urges that certain requirements of the claims must be particularly borne in mind. The claims are reproduced below with those requirements underlined:

1. In a batching apparatus of the class described, in combination, a main hopper to receive aggregate material, an auxiliary hopper disposed within the main hopper, weighing mechanisms one for each hopper, and means for connecting the hoppers with the weighing mechanism therefor so that each hopper may move independently relatively to the other and the materials contained therein.

5. In a batching apparatus of the class described, a main hopper to receive coarser aggregate material,

an auxiliary hopper to receive cement disposed so as to discharge the cement onto and into the coarser aggregate material, discharge means for each of said hoppers, the same being concentrically disposed and serving to produce commingling of the cement and coarser aggregate, means whereby the quantity of the cement in the cement hopper and the quantity of coarser aggregates in the main hopper therefor may be accurately measured independently, means for discharging each of said hoppers to effect the commingling action referred to as the aggregates pass from the hoppers flowing in a shaft-like stream while the hoppers are discharging, and instrumentalities to supply water to the flowing shaft of aggregates in a tubular stream surrounding said aggregates and flowing into same at an angle thereto.

#### **Burden of Proof.**

The burden of establishing invalidity of a patent shall rest on a party asserting it (35 U. S. C. 282).

Also, as stated by this Honorable Court in *Whiteman v. Mathews*, 216 F. 2d 712 (C. A. 9, 1954):

“the burden of proof imposed upon a party tendering the issue of prior public use is a heavy one. It is not satisfied by a mere preponderance of the evidence, but is borne successfully only if the evidence is clear and satisfactory—perhaps beyond a reasonable doubt.”

We submit that the evidence offered by the Defendant on the so-called Alabama Street plant is NOT clear and satisfactory, let alone beyond a reasonable doubt, and that it fails to establish an anticipation of claims 1 and 5 of the Johnson patent, 2,138,172.

We also submit that the evidence offered by the Defendant was not such as to support the conclusion that claims 1 and 5 of the Johnson patent 2,138,172 fail to define any intention over the alleged prior use.

### **The Evidence.**

The trial court, in making its Findings of Fact 7 through 15, 17, and 19 through 24 [Tr. pp. 79-83], erroneously found that a prior use had been established and that the constructional details of the Alabama Street batching apparatus *prior to February 10, 1935*, were conclusively established. It then erroneously concluded that claims 1 and 5 were anticipated by the alleged public use, and that they failed to define any invention over the alleged prior use.

### *The Prior Art Patents Relied Upon by Defendant.*

Although prior to the trial Defendant had alleged numerous prior art patents and publications which appear in Defendant's Exhibit B, the only ones touched upon at the trial were Johnson's earlier patent 1,687,499 and the Robb patent 1,750,244 [Tr. pp. 172-176, 232-235, 438-440, 463]. Both of these patents were considered by the Patent Office during the prosecution of Johnson's application for patent 2,138,172 [Pltf. Ex. 11].

Concerning the earlier Johnson patent 1,687,499, the witness Wright said that it did not disclose a hopper within a hopper [Tr. p. 173], that there were no weighing means and that there was no suggestion of pre-mixing or intermingling the ingredients. Rather, there was a "ribboning" effect [Tr. pp. 172-175, 232-233].

Concerning the Robb patent 1,750,244, Defendant's own expert, Wisniski, stated that its apparatus provided

only as much mixing or intermingling action *as there would be in any gathering hopper* [Tr. pp. 438-440, 463], and that in the Robb construction an intermingling must take place *in the collecting hopper* [Tr. pp. 462-463]. He did not even suggest that an intermingling or pre-mixing took place at the *discharge* of the Robb apparatus.

However, when asked about the *discharge* of the Johnson type batching apparatus where the cement falls into the converging streams of aggregate, he answered, "I am sure it intermingles" [Tr. pp. 455-457].

#### *Murasko's Testimony.*

Murasko, at the time of his testimony, had known the defendant Stromberg for three years [Tr. p. 514], Stromberg being a business caller upon Murasko's employer [Tr. p. 515].

Stromberg had not asked Murasko if he knew of a plant having a cement hopper in the center of the aggregate hopper until after Stromberg had made contact with the witness Cornett [Tr. p. 515].

Murasko worked at the Alabama Street plant from 1931 until the last day of May, 1942, first as a plant operator and later as superintendent [Tr. pp. 474, 490, 515]. When Murasko became superintendent, Cornett became the operator [Tr. p. 490]. This relationship continued *for six years* [Tr. p. 515] until Murasko left in 1942.

After Defendant's Exhibit A was removed from in front of him [Tr. p. 485], Murasko made a sketch to illustrate his recollection of the batching apparatus at the Alabama Street plant [Deft. Ex. E, which sketch, of course, has no more force or effect than Murasko's oral

testimony]. The batching apparatus was used to charge a stationary one cubic yard mixer [Tr. p. 494].

While describing his sketch, he said that the baffles at the bottom of the cement compartment came to within about 4 inches of the aggregate gate [Tr. p. 487], and that the cement hopper discharge was approximately 12 inches above the aggregate hopper discharge [Tr. pp. 488-489].

In answer to leading questions Murasko also stated that the Alabama Street batching apparatus contained a cement hopper inside the aggregate hopper [Tr. pp. 485-486], and that there were separate *scales* connected to each hopper [Tr. p. 486].

Murasko also stated that the water was inserted into the mixer *in one steady stream* [Tr. p. 492], that it *made no difference* if the water went in first *because it was only a one yard mixer*, and that it wouldn't cause any balling *in that size mixer* [Tr. p. 494].

### *Cornett's Testimony.*

The witness Cornett, a skiploader operator for a construction company, offered no explanation as to how and when he had been contacted regarding this action. All of his testimony was given with Defendant's Exhibit E before him.

Cornett worked for the owners of the Alabama Street plant from 1930 until 1947, except for a period during the depression when he worked on a dredge [Tr. pp. 517, 526]. He first worked with them as a truck driver and then as operator for the Alabama Street Plant [Tr. pp. 518, 526, 527]. He had never seen the interior of the plant prior to going to work in it [Tr. p. 529].

In answer to an inquiry concerning events outside the plant at or about the time he went in as an operator, Cornett replied, "I don't remember. I was just the mixer man upstairs and I had nothing to do with any other part of the business. They would call for a mix and I would mix it up, and that's all I know" [Tr. p. 525]. (This sharply contrasts with Murasko's supposed recollection of business transactions outside the confines of the plant while he was the operator.) While Cornett was an operator, Murasko was his superintendent [Tr. p. 525]. He worked under Murasko *for six years* [Tr. p. 591] until Murasko left in 1942 [Tr. p. 530]. **THUS CORNETT IS IN NO POSITION TO TESTIFY AS TO THE DETAILS OF THE BATCHING APPARATUS PRIOR TO 1936, A DATE MUCH LATER THAN THE REQUIRED FEBRUARY 10, 1935 DATE, OR TO FIX DATES PRIOR TO 1936. ALTHOUGH HE CLAIMS 1933 OR 1934 TO BE THE YEAR HE WENT INTO THE PLANT, THESE DATES WERE UNSUPPORTED AND ARE NOT CONSISTENT WITH THE SIX YEAR PERIOD STATED BY BOTH HIMSELF AND MURASKO [Tr. pp. 515, 591].**

In describing the batching apparatus he operated, Cornett said that the cement flowed right *about* the middle of the aggregate, and into a big V chute where the *cement hit the chute about three-quarters of the way up* and went in right with the aggregate [Tr. p. 522]. He was also quite positive in stating that the cement and aggregate did *not* intermingle or mix at the discharge gate and *only mixed down in the chute* [Tr. pp. 540, 542, 543].

Although he had no recollection as to the details of the aggregate discharge gate, he twice stated that the dimensions of the cement hopper outlet were 12 x 18 [Tr. pp. 588, 589].



On cross-examination he stated that Murasko had failed to mention that the air operated ram for the cement discharge gate extended into the aggregate hopper and was covered by a generally horizontal baffle plate [Tr. pp. 594, 596]. When it was pointed out to him that this would produce an open area in the encircling wall of aggregate, he replied "No, because it falls over the top and *comes back together again*" [Tr. p. 596].

Cornett also stated that the cement gate air ram was mounted on a bracket secured to the aggregate hopper [Tr. pp. 594, 596]. When it was pointed out to him that this would affect the accuracy of the weighing of the cement hopper, his explanation was that the ram "is mounted on flexible springs" [Tr. p. 595]. When it was then pointed out to him that he could not have completely *independent* movement of the aggregate and cement hoppers and was asked how the cement could be weighed accurately, his reply was "Your scales are set that way" [Tr. pp. 595, 596].

As to the water insertion means, he testified that just a single stream of water was used and that no attempt was made to encircle the aggregate stream with water [Tr. p. 591].

### *Bodinson's Testimony.*

Bodinson testified that he is the present owner of the company in whose files the prints and shop orders comprising Defendant's Exhibits A and F through P were found.

Bodinson also testified that he had nothing to do with the drawings or prints at the time they were made [Tr. p. 579], and that at no later date did he compare them with the Alabama plant to make certain that they identify that in detail [Tr. p. 580].

As to the plant itself he testified that it

“was open all around at the base and had a stairway from the ground floor up to the batch floor, and from there on it was covered with galvanized sheeting for a short distance, and then it went into wood structures which housed all the sand and gravel in the bins to make the weigh floor” [Tr. p. 577].

### *Defendant's Exhibits.*

There being no testimony as to the contents of Defendant's Exhibits A and F through P other than which was read from the documents themselves, any attempted explanation as to what they show must rely upon pure conjecture. Suffice it to say that there is no showing of a concrete weigh batcher in which the cement is discharged onto and into the aggregate at the point of discharge, there is no suggestion of a water encircling means and there is no showing of an aggregate batcher having a single discharge opening.

There is also no showing of a weigh batcher in which one discharge gate is spaced 12 inches above the other discharge gate—as testified to by Murasko, or of a cement batcher having a 12 x 18 discharge outlet—as testified to by Cornett. The only cement batcher discernible has a round opening 10 inches in diameter and a 13 x 13 plate for closing it. There are no baffles discernible which terminate 4 inches from the aggregate discharge gate.

Defendant's Exhibit K also indicates that the aggregate hopper contained an *integral cement compartment* instead of a separate cement hopper. See Sheet No. 4 thereof which reads:

“One 6-ton weigh hopper—with cement compartment and 120 gallon water tank integral—per dwg. ‘L-2348’—and consisting of:

1 Hopper—Complete per details . . .”

**The Evidence Relating to the Alabama Street  
Plant Is Conflicting.**

The Trial Court in its Findings of Fact 10, 11, 12, 13, 14, 15, 17 and 19 [Tr. pp. 80-83], found that the evidence establishes the construction and mode of operation of the batching apparatus at the alleged Alabama Street plant prior to February 10, 1935, and that the facts as to it were conclusively established and fully corroborated by the witnesses, Murasko, Cornett and Bodinson and by Defendant's documentary exhibits. It takes no more than a cursory examination of the evidence to determine that these findings are clearly erroneous.

The testimony of the witness Murasko, who had known the Defendant for three years before the trial, does not by itself support the above findings. Without benefit of personal records, he glibly testified as to circumstances alleged to have existed at least twenty-one years before the trial. But even at that he failed to establish that the apparatus at the alleged Alabama Street plant anticipated Johnson's invention. MURASKO DID NOT EVEN SUGGEST THAT THE BATCHING APPARATUS AT THE ALABAMA STREET PLANT PRE-MIXED OR INTERMINGLED THE CONCRETE INGREDIENTS AS THEY WERE DISCHARGED. The only thing he suggested about the Alabama Street apparatus was that it made no difference as to how the ingredients were introduced into their one yard size mixer [Tr. p. 494].

Cornett's testimony lends no support whatever to Murasko's testimony. He failed to establish that his recollection was based on circumstances existing prior to February 10, 1935. The unsupported 1933-1934 dates he gave are inconsistent with the assertions made by both himself and Murasko to the effect that Cornett was only

an operator for six years before Murasko left in 1942 [Tr. pp. 515, 591], and Cornett's assertion that he had never seen the interior of the plant prior to going to work in it [Tr. p. 529].

Regardless of point of time, however, Cornett positively stated that the cement and aggregate in the Alabama Street apparatus *did not intermingle or mix* at the discharge gate *and only mixed down in the chute* [Tr. pp. 540, 542, 543]. Cornett also testified that the aggregate hopper contained a generally horizontal baffle plate for covering the air operating ram for the cement discharge gate, and that the ram "is mounted on flexible springs" secured to the *aggregate* hopper [Tr. pp. 594-596]. When it was then pointed out to him that this would not permit *independent* movement of the cement and aggregate hoppers, Cornett's only reply was "Your scales are set that way" [Tr. pp. 595, 596].

Bodinson testified that he had found Defendant's Exhibits A and F-P in his company's files, that he had nothing to do with them at the time they were made [Tr. p. 579] and that at no time had he compared them with the apparatus at the alleged Alabama Street plant [Tr. p. 580].

No one testified as to the contents of Defendant's Exhibits A and F-P other than to read titles from the prints themselves. No one testified that said exhibits disclosed a concrete batching apparatus in which the cement was discharged onto and into the aggregate material to produce commingling of the cement and aggregate, or that the hopper discharge means were concentrically disposed.

Although the witness Bodinson, in answer to leading questions, said that Defendant's Exhibit I disclosed an aggregate weigh hopper having an independent cement hopper in the center and that it pertained to the con-

struction of the Alabama Street plant [Tr. p. 564], Defendant's Exhibit K indicates on Sheet No. 4 thereof that the Alabama Street plant had only one weigh hopper with an *integral* cement compartment. Regarding the latter exhibit, Bodinson stated that it "spells out in detail, every bolt, nut, drawing number, bearing, *hopper*, general description of everything that goes into the construction of that particular order" [Tr. p. 566].

Defendant's Exhibit A shows a cement hopper with a round discharge opening 10 inches in diameter, and Defendant's Exhibit F shows a 13 x 13 plate for a cement hopper gate. Thus they do not conform to Cornett's testimony that the cement hopper at the Alabama Street plant had a 12 x 18 discharge outlet [Tr. pp. 588, 589].

It is inconceivable that solely upon this confused and conflicting evidence the trial court could make the aforementioned Findings of Fact, especially in view of the heavy burden of proof placed upon a Defendant raising the highly technical defense of a prior public use. They are clearly erroneous and should be so found.

Finding of Fact No. 7 is also urged to be clearly erroneous. There is not a shred of evidence to establish that the batching *apparatus* at the alleged Alabama Street plant was "operated publicly, openly and for commercial purposes." The only evidence on this point was that of Bodinson who testified that the plant was covered with galvanized sheeting from the batch floor to the wood structures which housed the sand and gravel in the bins [Tr. p. 577]. The fact that the exterior of a *plant* is open to public view is in no way an indication that its *internal apparatus* is open to public view.

The Evidence Does Not Establish Invalidity of  
Claims 1 and 5 of Johnson Patent 2,138,172.

On the above evidence alone, the District Court has concluded to be invalid two claims to an invention which constituted a basic step forward in the art of concrete batching, and which step forward has withstood the test of time.

It is strongly urged that the trial court's conclusion was incorrect, and that claims 1 and 5 are not anticipated by the Alabama Street plant or by the prior art patents and publications.

Referring first to claim 1 (This Brief, p. 19), there is no teaching in the prior art patents and publications of "an auxiliary hopper disposed within the main hopper," or of the combination thereof with "weighing mechanisms one for each hopper." Assuming that such elements were present in the Alabama Street plant, it has *not* been established that there were present "means for connecting the hoppers and the weighing mechanism therefor so that each hopper may move *independently* relative to the other and the materials contained therein."

The witness Cornett testified [Tr. pp. 594-596] that the aggregate and cement hoppers of the Alabama Street plant *were connected* to each other by springs. Such connections must necessarily adversely affect the accuracy of weighing by preventing *independent* movement of each hopper relative to the other.

With relation to claim 5 (This Brief, pp. 19-20), the above-mentioned spring connections mean that the Ala-

bama Street plant incorporated no “means whereby the quantity of the cement in the cement hopper and the quantity of coarser aggregates in the main hopper therefore may be *accurately* measured *independently*.”

Claim 5 is also highly specific to commingling or pre-mixing of the cement and aggregate. It recites that the cement hopper is “disposed so as to discharge the cement *onto* and *into* the coarser aggregate material.” It recites discharge means “concentrically disposed and serving to produce *commingling* of the cement and coarser aggregate.” It additionally recites “means for discharging each of said hoppers to effect the *commingling* action referred to *as the aggregates pass from the hoppers* flowing in a shaft-like stream while the hoppers are discharging.”

Claim 5 thus recites not only the vital commingling, or pre-mixing, but also that such commingling occurs “as the aggregates pass from the hoppers.” This is in direct contrast to the testimony of the witness Cornett [Tr. pp. 540-543; This Brief, p. 24] that there was *no* intermingling at the discharges of the cement and aggregate hoppers at the Alabama Street plant. If there was any intermingling of cement and aggregate at such plant, it did not occur until the materials hit the chute [Tr. pp. 540-543; This Brief, p. 24] leading into the mixer.

In addition to the above, the Alabama Street plant did not incorporate [Tr. pp. 492, 591] the water means required by claim 5, as follows: “instrumentalities to supply water to the flowing shaft of aggregates in a tubular

stream surrounding said aggregate and flowing into same at an angle thereto.”

That the prior art patents and publications did not anticipate claim 5 is clear (This Brief, pp. 21-22), there being no suggestion therein of commingling at concentrically arranged discharges, or of a water ring around the discharging shaft of cement and aggregates.

In view of the above it is respectfully submitted that the prior art, including the Alabama Street plant, does not anticipate either claim 1 or claim 5.

It is further submitted that claims 1 and 5 define invention over the prior art, reference being made to pages 5 to 10 of this brief. The invention was clearly not “obvious” under 35 U. S. C. 103, either over the prior art patents or the Alabama Street plant or a combination thereof. In this connection it is pointed out that Findings 20 and 21 [Tr. p. 83] were the only ones made relative to the question of invention and obviousness as distinguished from anticipation—and these findings involved the water ring (claim 5) only. The Findings 20 and 21 are believed to be clearly erroneous in view of the fact that Defendant presented no evidence whatever about the water ring.



## POINT II.

**The Trial Court Abused Its Discretion by Admitting Evidence Relative to the Alabama Street Plant Despite Failure by Defendant to Comply With 35 U. S. C. 282.**

Title 35, United States Code, Section 282, paragraph 3, reads as follows:

“In actions involving the validity or infringement of a patent the party asserting invalidity or non-infringement shall give notice in the pleadings or otherwise in writing to the adverse party at least thirty days before the trial, of the country, number, date, and name of the patentee of any patent, the title, date, and page numbers of any publication to be relied upon as anticipation of the patent in suit or, except in actions in the United States Court of Claims, as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention of the patent in suit. In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires.”

The quoted portion of Section 282 of the Patent Act of 1952 made several changes in prior law (Sec. 69 of Repealed Title 35, U. S. C.). A first change was to strengthen greatly the thirty-day notice rule by excluding not only alleged anticipations, unless properly noticed, but also patents attempted to be introduced “as showing the state of the art”. The common practice of bringing in “state of the art” patents, without notice, and previ-

ously permitted by such cases as *Jacuzzi Bros., Inc. v. Berkeley Pump Co.*, 191 F. 2d 632 at 637 (C. A. 9, 1951), was thus abolished by the 1952 act.

A second change, and one with which the present case is primarily concerned, appears to give the Trial Court discretion relative to the introduction of such evidence. This change is made by the following sentence: "In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires." Plaintiff has not been able to find any reported decision which interprets this portion of Section 282, so the present case is apparently one of first impression.

Plaintiff fully appreciates that it is not entitled to reversal unless there was an abuse of whatever discretion was given by the statute to the Trial Court. It is submitted, however, that an abuse was clearly present under the instant set of facts.

**Defendant's Conduct Prior to Trial Did Not Entitle Him to a Favorable Exercise of the Trial Court's Discretion.**

As stated previously (This Brief, pp. 11-12), Defendant not only failed to prepare for trial prior to the original trial date of July 25, 1956, even to the extent of not filing the trial memorandum required by local Rule 12 of the District Court, but his conduct prior and subsequent to such original trial date was such that his then attorney, H. Calvin White, Esq., was forced to withdraw from the case with the consent of the Court. Mr. White's affidavit in support of the withdrawal motion [Tr. pp. 43-45] reads as follows, in part:

"On these matters I have experienced controversy, misunderstanding or disagreement with defendant,

and I have found myself unable to obtain from defendant definite authorization to do those things which I consider necessary for proper presentation of defendant's case from the standpoint of the Court, defendant and myself. Most recently I had been unable to learn from defendant whether defendant would appear at the trial as set for July 25, 1955, after I had advised defendant that his appearance, in my opinion, would be necessary.

"On July 21, 1955, I informed defendant by registered mail of the intention of his attorneys to withdraw from the case and recommended the appointment of substitute attorneys. On July 27, 1955, I again wrote to defendant advising him the case was scheduled for further setting on September 12, 1955, and suggested that substitute counsel appear on that date. I have received no response to that letter. On August 29, 1955, I wrote defendant asking him to advise me whether substitute counsel would appear in this Court on September 12, 1955, for further setting of the case. No response to this letter has been received."

The affidavit shows that with the July 25th trial date fast approaching, Mr. White was unable to get cooperation from Defendant—*even to the extent of finding out whether Defendant would show up at the trial.*

The affidavit also shows that for a period of over six weeks, Mr. White was unable to receive any response to a registered letter, and several follow-up letters, written to Defendant [Tr. pp. 44 and 45]. Defendant would not even accede to Mr. White's recommendation that substitute counsel be appointed. Since Plaintiff's counsel William D. Sellers, Esq., did not hear from Mr. Lyon until December 8, 1955 [Tr. p. 50], it is to be presumed

that Defendant did not get around to appointing new attorneys until several months after Mr. White was relieved of responsibility by the Court. The presumption is bolstered by the fact that, in a memorandum filed February 24, 1956, Mr. Lyon stated that he had “recently” been appointed as counsel in this action [Tr. p. 47].

Is this the type of conduct that should permit a defendant to come in, in the middle of a trial and without statutory notice, with a surprise public use which could, with adequate and non-dilatory trial preparation, have been discovered in time to prevent prejudice to a plaintiff? It is respectfully submitted that the answer to this question is clearly in the negative.

#### **“Technicality” Issue Raised by Trial Court.**

When the foregoing was before the Trial Judge [Tr. pp. 162-166, 495-503], he indicated a belief that Defendant’s conduct might be excused because of a personality clash [Tr. pp. 163, 500] with counsel, and that Plaintiff was merely relying on “technicalities”. Thus the Trial Judge indicated that “We are not trying the attorneys” [Tr. p. 163], and that “what we are trying to do here is not to try cases upon technicalities but upon the facts and with justice” [Tr. p. 164].

As stated by Mr. Sellers, however [Tr. pp. 163-164], the Trial Judge was clearly turning the situation around. It was Defendant’s dilatory conduct that was on trial, not his attorney’s. There was nothing upon which to base the Court’s assumption of a personality clash or any dereliction on the part of Mr. White.

The so-called “technicalities”, recently reaffirmed and strengthened in the Patent Act of 1952 (This Brief, p. 33), are designed to save a plaintiff from prejudice resulting

from just such conduct. Reasons for the prior notice rule, which has been in the law since the early days of the patent system, were stated by Mr. Justice Story in the early Supreme Court case of *The Philadelphia and Trenton Railroad Co. v. Stimpson*, 39 U. S. 448 at 459 (1840), as follows:

“The object of this most salutary provision is to prevent patentees being surprised at the trial of the cause, by evidence of a nature which they could not be presumed to know, or be prepared to meet, and thereby to subject them either to most expensive delays, or to a loss of their cause.”

The thirty day notice rule is no mere “technicality”, but is essential to decent judicial process. A dilatory defendant should be as effectively barred from this defense by failure to give notice as he would be by a statute of limitations, by a requirement that a notice of appeal be filed within a certain period, by some of the rules of this Honorable Court, or by many other so-called “technicalities” in the law.

In contrast to the above, it is Defendant who is trying to take advantage of a “technicality”—which was stated by Learned Hand to be an “anomaly” and “contrary to the underlying theory of the law” (*Gillman v. Stern*, 114 F. 2d 28, 31 (C. A. 2, 1940)). Judge Hand’s statements pertain to situations where the so-called “public” use, by a complete stranger to the litigation, *did not in fact inform the art as to the invention*. Such a situation is clearly present under the instant set of facts. Not even Defendant, despite many years in the field, knew of the Alabama Street plant until recently. Furthermore, the batching apparatus was hidden from view, and spaced well above the ground.

The function and purpose of the patent system is to result in the teaching of inventions to the art throughout the United States. This function is not performed whether the use is intentionally secret, or whether it is in fact not sufficiently public to teach the art *even in the state* (California) *where the use occurred*. Hence the anomaly that an intentionally secret use will not invalidate (*Gillman v. Stern, supra*) whereas an uninforming use may invalidate.

The law may have afforded Defendant the anomalous technicality of trying to invalidate a patent by reason of an alleged construction by a third party for which Defendant is entitled to no credit whatever, and which did not in fact inform the art as to the invention. However, Defendant was afforded this technicality *on condition* of giving notice that he was going to claim it—a condition imposed because of a realization that such a defense is very likely to be based upon stale and un rebuttable evidence. The defense being a technical one and an anomaly, it should only be available to a deserving defendant who properly presents it—especially where it is raised to defeat a long-standing and respected patent that has well performed the purpose of the patent system by teaching the invention to the art throughout the United States and the world.

#### **Admission of Evidence Relative to the Alabama Street Plant Was Prejudicial to Plaintiff.**

After the introduction of the surprise evidence, Plaintiff was unable to discover rebuttal evidence relative to the Alabama Street plant. This was because (a) more than two decades elapsed since the critical period, and (b) the plant was destroyed in 1947 [Tr. p. 523]. This,

however, is no indication that Plaintiff was not greatly prejudiced by the surprise evidence.

Under normal procedure prior to trial of a patent action, a plaintiff is given ample opportunity to study thoroughly the documentary evidence to be introduced by a defendant at trial. The plaintiff can thus gain a thorough understanding of such documents, and is in a position to conduct an adequate and effective cross-examination of the witnesses testifying relative to them. This is the great benefit of the 30-day notice rule, particularly where, as here, the defense is based upon stale and un rebuttable evidence.

In the present action Plaintiff was not given 30 days in which to study the documentary public use evidence before cross-examining the witnesses. Plaintiff was not even given a few days in which to study the great bulk of the documentary evidence [Exs. F-O, incl.], although Defendant admittedly knew of the alleged public use by the middle of the week before trial [Tr. p. 157]. Instead, Plaintiff's attorney, Mr. Sellers, was forced to cross-examine the witnesses without having any chance to study the mass of prints and orders relied upon by Defendant, excepting Exhibit A which was introduced three days before the critical cross-examination.

It is pointed out that the documentary evidence comprises relatively hard to read and detailed shop-prints and orders having inscribed thereon many dates, initials, and other things which can only be comprehended after hearing explanations given during well prepared examinations of competent supporting witnesses. The Court itself stated that "I can't read" Exhibit F [Tr. p. 556]. Plaintiff had no opportunity to prepare for such examinations.

In summary, Defendant's failure to comply with 35 U. S. C. 282 deprived Plaintiff of the only recourse it had against this old and un rebuttable evidence. Because of his own grossly dilatory conduct, Defendant should be *permanently* barred from raising this defense and thus causing Plaintiff further delay and expense.

**The Trial Court Was Laboring Under a Mistake in Fact and Judgment When It Failed to Grant Plaintiff's Motion to Strike the Evidence Re Public Use, Which Mistake Is Indicative That There Was an Abuse of Discretion.**

Immediately after conclusion of testimony relative to the alleged Alabama Street plant by the witness Murasko, the Trial Court invited Plaintiff's Counsel, Mr. Sellers, to enter a motion to strike under 35 U. S. C. 282 [Tr. p. 495]. The motion was made, after which the following discussion occurred.

"The Court: No, I don't want an argument, but I want to ask you a question. Because of the testimony here and the production of this witness, this knowledge will become general among the trade. The next time you attempt to establish a patent or the next time you file a suit for infringement of this patent, if the patent is sustained, they will raise a question whether or not there is prior use. Wouldn't that be a good defense in a subsequent suit?

Mr. Sellers: That would be important were it not a fact that the patent has expired. In other words, we are here seeking damages for past infringement. The patent has expired and—well, there could be more suits.

The Court: You mean to say the only thing you are interested in in this case is damages?



Mr. Sellers: Yes your Honor.

The Court: It is not a question of the establishment of your patent?

Mr. Sellers: The patent has expired, your Honor.

The Court: So what you are fighting for here is damages?

Mr. Sellers: That is correct.

The Court: The motion is denied.”

It subsequently appeared [Tr. p. 497] that the Trial Court was under the mistaken impression that patents run for 20 years instead of 17, and was not previously aware that the patent had expired some months before trial of the present action, although fifteen months after filing thereof.

There was also, for a substantial period of time, apparently a failure on the part of the Trial Court to understand that even after expiration of the patent its validity must be upheld if damages for past infringement are to be given [Tr. pp. 498, 499, 508, 509, 511, 513].

The Trial Court also indicated its belief that it would be unjust “at this late date” [Tr. p. 501] to award damages on a patent if it were invalid.

From the above it will be understood that the Trial Judge believed there was *more reason for admitting the evidence and holding the patent invalid after its expiration than before*, so he immediately denied Plaintiff’s motion to strike when he discovered that the patent had expired [Tr. p. 496]. It will be apparent to this Honorable Court on appeal that just the opposite is the case, and

that expiration of the patent is instead a strong reason for excluding last-minute evidence brought in by a dilatory defendant.

Regardless of the ultimate outcome of the present litigation, Defendant is (and has been since expiration of the patent) free to copy the patented construction. The only relief here obtainable is damages for past infringement by Defendant. If the Alabama Street plant were a prior public use, it would be available to any other party that Plaintiff could sue for damages for infringement occurring prior to expiration of the patent.

If the patent had not expired, and assuming (for the present portion of the argument only) that the Alabama Street plant were an anticipating plant and a bar, exclusion of the evidence relative to such plant would have been infinitely more detrimental to Defendant than under the present set of facts. This is because a judgment for Plaintiff would in such circumstances have resulted not only in damages but also in the much more drastic and cogent relief of an injunction.

The above mistakes in fact and judgment on the part of the Trial Court are strong evidence that there was an abuse of discretion. Accordingly, and in view of Defendant's conduct and the resultant prejudice to Plaintiff, it is respectfully submitted that all evidence relative to the Alabama Street plant should be permanently excluded.

### POINT III.

#### The Documentary Evidence Relative to the Alabama Street Plant Is Hearsay, and Was Not Properly Admitted Under 28 U. S. C. 1732(a).

Title 28 United States Code, Section 1732(a), reads as follows:

“In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, *if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.*

“All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

“The Term ‘business’, as used in this action, includes business, profession, occupation, and calling of every kind.” (Italics ours.)

This subsection is substantially the same as its predecessor, Title 28 U. S. C., 1940 Ed., Section 695, except for changes in phraseology.

Although this statute has been indicated by this Honorable Court to be a liberalizing one (*Arena v. United States*, 226 F. 2d 227, 235 (C. A. 9, 1955)), it is clear that the statute was not intended to open wide the door to avoidance of cross-examination (*Palmer v. Hoffman*,

318 U. S. 109, 114 (U. S. Sup. Ct. 1943)), and is to be applied with caution (*Zacher v. United States*, 227 F. 2d 219, 227 (C. A. 8, 1955); *Wing Wing Foo v. McGrath*, 196 F. 2d 120 (C. A. 9, 1952); *Teter v. Kearby*, 169 F. 2d 808 (C. C. P. A. 1948)).

The Trial Court apparently believed that it was merely necessary to show that such records are customarily present in the files of the company in order to render them admissible [Tr. pp. 550, 551, 573]. That mere presence in the files is not enough is shown by the following decisions:

*National Labor Relations Board v. Sharpless Chemicals, Inc.*, 209 F. 2d 645, 653, 654 (C. A. 6, 1954);

*Schmeller v. United States*, 143 F. 2d 544, 550 (C. A. 6, 1944);

*William Whitman Co. v. Universal Oil Products Co.*, 125 Fed. Supp. 137, 145 (D. C. Del., 1954).

Present "custom" of keeping records is irrelevant. Instead, the statute specifically requires, before admission of the evidence:

- (1) That it be shown that the records *were made in the regular course of any business*, and
- (2) That it be shown that the making of such records was the regular course of business *at the time* of the act, transaction, occurrence or event, or within a reasonable time *thereafter*.

**There Was No Competent Evidence to the Effect  
That the Records in Question Were Made in the  
Regular Course of Business.**

The witness Bodinson was relied upon in support of the admission of the documentary evidence [Deft. Exs. A and F-P, incl.] relative to the Alabama Street plant [Tr. pp. 547 through 584]. This in spite of the fact that Mr. Bodinson, in the Court's own words, was only "a boy working around the plant" [Tr. p. 578] at the time in question and *had no knowledge* relative to the exhibits [Tr. pp. 554, 579, 580] or their accuracy. As a school boy of about 17 [Tr. p. 548], he wasn't even present while most of the plant was built [Tr. pp. 576, 577].

Mr. Bodinson subsequently acquired engineering ability, and became an officer of the company [Tr. p. 581] in 1940, or nine years after the plant was allegedly built. Both the witness and the Court, however, stated that the witness was not competent to testify as to company policy before 1940 [Tr. pp. 568, 581]. He, accordingly, was not competent to testify that the records were made in the regular course of business.

**There Was No Competent Evidence That the  
Making of Records Such as the Ones in Question  
Was the Regular Course of Business at the Time  
of the Act or Within a Reasonable Time There-  
after.**

It is common engineering practice to make drawings of various forms of a proposed product, and then actually build one such form of product, frequently with changes, in accordance with what is later thought to be most desirable. On the other hand, it is highly uncommon to make drawings *at the time* the product is actually being

built or within a reasonable time *thereafter*, since drawings would be of little or no value unless made *before* the event.

The drawings in question were in all probability, therefore, made before the apparatus was built, if built at all, not *at* the time the apparatus was built or *thereafter*, as the statute requires. Defendant produced no evidence showing that the drawings in question were made at or after the building of the apparatus. Whether the Alabama Street plant was built in accordance with the drawings in evidence, or in accordance with some other drawings, or in accordance with no drawings at all, is not known.

In any event, "records" made before the event do not fall within the wording or intent of the statute. The previously cited cases (This Brief, pp. 43-44) teach that it was the intent of the statute to render more readily admissible records of a *routine* or *clerical* nature, which experience has shown to be highly reliable. This rationale does not apply to relatively complicated drawings and orders, such as Defendant's Exhibits A and F-P, made before the event and which do not "record" anything but what might occur in the future. Hearsay documentary evidence of the type under consideration should be supported by the testimony of a competent witness (subject to cross-examination) who was not an inexperienced boy at the time in question, and who was in a position to know company policy at *that* time.

For all of the above reasons, the documentary evidence [Deft. Exs. A and F-P, incl.], should have been excluded. It is submitted that the admission of such evidence was clearly prejudicial to Plaintiff, and reversible error.

#### **POINT IV.**

##### **Defendant's Infringement Is Clear.**

That the infringement was not accidental may be inferred from inconsistencies between the testimony of Defendant [Tr. pp. 342, 343], who said that prior to 1950 he had never seen a batching plant of the central cement hopper type, and that of an unbiased witness [Tr. pp. 395, 396] who said that in January, 1948, his company had batching plants of the centrally positioned cement hopper type and that at that time the Defendant was in charge of their maintenance crew, repairing the batching plants and anything connected with them.

Defendant's infringement of claim 1 was not seriously contested.

Defendant's infringement of claim 5 is obvious from a mere inspection of Plaintiff's Exhibit 18, and from a reading of pages 125 and 126 of the Transcript. Defendant himself admitted [Tr. pp. 359, 360] that there was intermingling at the hopper discharges. The Trial Court was "convinced" that this was the case with relation to Plaintiff's Exhibit 14 [Tr. pp. 361 and 367].

#### **POINT V.**

##### **There Is No Necessity of a Remand to the Trial Court for Further Findings.**

The District Court stated that it was basing its decision on "all the evidence in the case" [Tr. p. 650], and this may be presumed to include not only the evidence relative to the Alabama Street plant but also relative to the prior art patents and publications [Deft. Ex. B]. Thus, since the Findings relate only to the Alabama Street plant, it is to be presumed that the District Court did not believe the claims to be invalid over the prior art

patents and publications. At any rate, it is submitted to be clear that invention is present over the prior art patents and publications (This Brief, pp. 21-22).

In view of the above, and in accordance with the principles enunciated in *Yanish v. Barber*, 232 F. 2d 939 (C. A. 9, 1956), it is submitted that there is no need to remand the case to the District Court for findings relative to infringement or to invention over the prior art patents and publications.

### Conclusion.

It is respectfully urged that the judgment be reversed, that Johnson Patent No. 2,138,172 be held valid and infringed by Defendant, and that an accounting of damages be awarded to Plaintiff, The C. S. Johnson Company.

It is also respectfully urged that Plaintiff be awarded costs and attorney's fees. In this connection, the attention of the Court is invited to pages 650 and 651 of the Transcript.

Respectfully submitted,

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No. 15249

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

C. S. JOHNSON COMPANY, a Corporation,

*Appellant,*

*vs.*

MERLE W. STROMBERG, Doing Business as California  
Batching Equipment Co.,

*Appellee.*

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APPELLEE'S BRIEF.

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FILED

JAN 11 1957

PAUL P. O'BRIEN, CL



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**APPELLEE'S BRIEF.**

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**Statement of Jurisdiction.**

This is an appeal from the judgment of the District Court dismissing the complaint. Plaintiff has appealed.

The action was tried before the District Court upon the issues formed by the complaint [R. 3] and the answer [R. 10] and by a pre-trial stipulation wherein the charge of infringement of the patent in suit was limited to claims 1 and 5 thereof and the count for unfair competition was dropped.

The jurisdiction of the District Court was based upon the patent laws of the United States (28 U. S. C. 1338(a)).

The District Court at the conclusion of trial, briefing and oral argument expressed its opinion verbally [R. 647-650]. Accordingly, findings of fact, conclusions of law and a judgment were prepared and adopted by the Court and filed May 18, 1956 [R. 78-84]. A notice of appeal was filed by plaintiff June 12, 1956 [R. 85].

This Court has jurisdiction of the appeal and the appeal was timely (28 U. S. C. 1291, 1292(4)).

## Statement of the Case.

### (a) The Trial Court's Decision.

Johnson Patent No. 2,138,172 issued November 29, 1938, on an application filed February 10, 1937, and expired November 29, 1955.

The District Court held the patent in suit and more particularly claims 1 and 5 thereof invalid under Revised Statutes 4887 (35 U. S. C. 32 (1946 Ed.)) on the ground that the subject matter disclosed therein had been in public use in this country more than two years prior to the filing of the application for patent. The District Court expressly refused to determine, in the absence of such prior public use, whether the patent in suit was valid or infringed [R. 648].

### (b) The Patent in Suit Is Invalid as Lacking Invention.

The assertions of appellant on pages 5 to 12 of its opening brief have no support in either the findings of fact, conclusions of law or judgment of the trial court. These assertions merely represent the contentions of plaintiff and not the evidence as actually presented in the record. It is believed that the record fully establishes a lack of any invention in the patent in suit under the law as announced in *Great A. & P. Tea Co. v. Super-Market Equip. Corp.*, 340 U. S. 147, 95 L. Ed. 162; *Park-In-Theatres v. Perkins* (9 Cir., 1951), 190 F. 2d 137; *Himes v. Chadwick* (9 Cir., 1952), 199 F. 2d 100; *Kwikset Locks v. Hillgren* (9 Cir., 1954), 210 F. 2d 483; *Photochart v. Photo Patrol* (9 Cir., 1951), 189 F. 2d 625.

The patent is likewise invalid because the claims do not define patentable subject matter under the doctrine of *Reckendorfer v. Faber* (1876), 23 L. Ed. 719; *Willard, et al. v. Union Tool Co.* (9th Cir., 1918), 253 Fed.

48. Claim 1 of the patent defines two hoppers suspended from separate scales, each functioning entirely independently of and without regard to the other.

The plaintiff seeks to establish that a pre-mix or intermingling was his contribution to the art. This is vigorously denied and it is believed the record clearly establishes the contrary. See the prior art patent to Johnson, No. 1,687,499, and particularly the third paragraph of Column 1, Exhibit B. Plaintiff's expert witness, Wright, was unable to distinguish this teaching from that of the patent in suit in any manner brought out in the claims of the patent in suit [R. 232].

The testimony actually established that there is no such pre-mixing or intermingling and it has nothing to do with the quality of the concrete batched according to plaintiff's own witness, Pearman [R. 255-257, 263-264]. Pearman was the owner and operator of the accused batching plant [R. 241].

Even plaintiff's expert, Wright, testified that any pre-mix or intermingling which might be achieved was dependent entirely upon the relationship of the discharges of the cement and aggregate hoppers [R. 180, 186, 196, 217, 226]. Separate weighing had no effect on this intermingling [R. 203]. In other words, according to plaintiff's expert, the invention, if any, lies in making the discharges concentric and positioning one above the other with the uppermost discharge smaller than the lowermost. This relationship is not defined by claims 1 or 5. It is, of course, fundamental that a new element or limitation cannot be read into a claim which would otherwise be invalid. (*Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 93 L. Ed. 672.)

If the record contains any evidence at all of the presence of invention, the invention is not defined by the claims.

Plaintiff's so-called expert, Wright, testified without the benefit of any tests whatsoever to support his opinion as to what goes on in the patented device [R. 222]. His testimony was pure speculation not based upon actual observation or test. He admitted he did not have the educational background or any knowledge of the simple laws of physics upon which to base his opinions [R. 222, 223, 236, 237, 238, 239].

The witness Wisniski who has all the educational background [R. 422] and practical experience [R. 423-435] necessary to qualify him as an expert, testified that any discussion of pre-mix or intermingling in the Johnson type plant of the patent in suit was pure speculation [R. 441] and couldn't be established in the absence of any tests to prove or disprove the theory [R. 442].

Because of the lacking of any findings of fact, or conclusions of law or judgment from which an appeal would lie on the issues of validity or infringement, except on the prior use issue, appellee will not attempt to fully brief these questions. It is believed from what has hereinbefore been stated, that the claims in issue are clearly invalid. The record is full of conflicting testimony on the presence or absence of invention and infringement, and before this Court can exercise its appellate office, the case would have to be returned to the District Court for appropriate decision.

Since the trial court confined its judgment to one issue, that is, the existence of the prior use at 235 Alabama Street, San Francisco, California, and since this is the sole issue raised on this appeal, the appellee will hereinafter confine its brief to this issue.



## ARGUMENT.

### I.

**The Prior Use at 235 Alabama Street Invalidates Claims 1 and 5 of Johnson, Patent No. 2,138,172.**

The District Court was convinced of the existence of the Alabama Street plant in 1931 and more than two years prior to the filing of the application for the patent in suit. The District Court was convinced the Alabama Street plant was constructed and operated in accordance with the teaching of the patent in suit and consequently, the patent in suit is invalid.

Elaborate findings of fact were made by the District Court which fully support its judgment. The District Court had an opportunity to observe the witnesses, Murasko, Cornett and Bodinson, both on direct and cross-examination and believed their testimony [see Findings of Fact 22, 23, 24, R. 83]. Under Rule 52(a) of the Federal Rules of Civil Procedure, such findings of fact shall not be set aside unless clearly erroneous.

Thus, on this appeal the burden is on the appellant, not merely to establish that the findings might be wrong or that different findings might have found support in the record, but to convince this Appellate Court that the findings of trial court were "clearly erroneous." The trial court followed the test set forth in *Whiteman v. Mathews* (9th Cir., 1954), 216 F. 2d 712 [see Findings of Fact 11, 14, R. 80, 81], and concluded that the facts were conclusively established and beyond a reasonable doubt.

There was no evidence to the contrary offered. The trial was continued from March 16, 1956, until April 23, 1956, to permit appellant to investigate this prior use

and present any conflicting or contrary evidence. No request was made for a greater period of time or for any extension thereof. No evidence was offered by appellants when the trial reconvened on April 23, 1956 [R. 599, 604].

Thus, the record before the trial court clearly established the existence of the Alabama Street plant, its construction and mode of operation more than two years prior to the filing date of the patent in suit. There is no conflicting evidence. The appellant tries to reduce by its argument the quantum of proof but is unable to point to any evidence in the record tending to disprove the existence of the Alabama Street plant or its construction.

**(a) Murasko's Testimony.**

Vernon Murasko worked at the Alabama Street plant from 1931 until 1942 as an operator thereof, and for the last six years as superintendent [R. 490]. He testified as to its construction in 1931 and to the manner in which it was constructed and operated. He drew from his recollection, based upon more than 11 years' familiarity, a sketch, Exhibit E, illustrating same. He testified that the Alabama Street plant had a cement hopper within an aggregate hopper [R. 485] each suspended from separate scales [R. 486] which is the identical structure defined by claim 1 of the patent in suit. He also testified that the hopper discharges were concentrically disposed and positioned one above the other, which is the structure defined by claim 5 of the patent in suit.

The District Court believed Murasko's testimony [Finding of Fact 22, R. 83]. His testimony alone based upon 11 years' operation of the plant in question is sufficient to support the findings that the patent in suit was antici-

pated by and involved no invention over the Alabama Street plant. In this respect this case closely parallels the situation before this Court in *Whiteman v. Mathews* (9 Cir., 1954), 216 F. 2d 712, where oral evidence alone was held to be sufficient to establish a prior use. Here we have a disinterested witness whose testimony in no way was impeached, who testified from 11 years' experience with the Alabama Street plant and to whose testimony the Court gave full credence after having had the opportunity to see and hear him testify [Finding of Fact 22, R. 83]. It is submitted that the testimony of Murasko standing by itself is adequate to support the judgment of the trial court (*Whiteman v. Mathews (supra)*).

**(b) Cornett's Testimony.**

Cornett was also a disinterested witness whose testimony stands unimpeached. The trial court had an opportunity to see and hear his testimony and the Court believed him [Finding of Fact 23, R. 83].

Cornett testified that the Alabama Street plant was constructed in 1931 [R. 526] although he was not familiar with its interior until 1933 [R. 529]. Cornett worked as an operator of the Alabama Street plant from 1933 to 1947 [R. 518], both before and during the time Murasko was superintendent [R. 591, 592]. Despite the obvious attempt during cross-examination to obtain some conflict in his testimony, Cornett repeatedly testified that he worked a total of 12 years with Murasko except for a brief period during the depression, the last six years of which were under Murasko when he was appointed superintendent.

The effort on page 24 of appellant's brief to limit the testimony of Cornett to some time in 1936 is a miscon-

ception of what his and Murasko's testimony consisted and is contrary to the record [R. 530].

Cornett testified as to the construction and mode of operation of the Alabama Street plant and established its date of construction more than two years prior to the filing date of the patent in suit. It had a hopper within a hopper [R. 519] suspended from separate scales [R. 519, 522] and confirmed that Exhibit E accurately portrayed this construction [R. 519]. He testified as to the positioning of the discharges and the resulting operation [R. 522].

The testimony of the witness Cornett fully supports the judgment of the trial court. It is submitted that this oral testimony in and of itself is sufficient under the rule of *Whiteman v. Mathews*. This witness testified from 14 years' experience as an operator of the Alabama Street plant as to its construction. He has not been impeached and there is no conflicting testimony and the trial court gave full credence to his testimony [Finding of Fact 23, R. 83].

Surely the testimony of Murasko corroborated and fully supported by the testimony of Cornett and in the absence of any conflicting evidence, established the existence and construction of the Alabama Street plant more than two years prior to the filing date of the patent in suit.

### (c) The Documentary Evidence.

Exhibits A, and F through P are drawings and invoices for the Alabama Street plant produced from the records of the Bodinson Manufacturing Company. Fred W. Bodinson, president of the Bodinson Manufacturing Company, testified as to the method of making and filing such records by his company, that such drawings and

invoices were made in the regular course of business and that it was the regular course of business to make such records. This documentary evidence corroborates the oral testimony as to the date of construction of the Alabama Street plant as well as its construction. It is submitted that appellants' interpretation of Exhibit K is erroneous and not in accord with any of the testimony in the record.

**(d) The Evidence Relating to the Alabama Street Plant Is Not Conflicting.**

This first so-called conflict in the evidence asserted by appellant is supposed to be in Murasko's having failed to suggest that in the plant the concrete ingredients were pre-mixed or intermingled. As previously pointed out in this brief, appellee believes the record fails to establish that in any Johnson-type plant such action takes place. Murasko testified as to the construction of the plant, that it embodied a cement hopper within an aggregate hopper [R. 485] each suspended from separate scales [R. 486] which is the device defined by claims 1 and 5. If, as appellant urges, any pre-mixing or intermingling occurs in the Johnson plant, then it also must occur in the Alabama Street plant. The alleged infringing structure follows the teaching of the prior art and if the claims are construed broadly enough to be infringed by appellee's construction, they are invalid as reading directly on the prior art.

The second so-called conflict in the evidence is based upon the erroneous interpretation of the testimony of Cornett. Cornett testified that he worked *under* Murasko for six years but before then had worked *with* him for an additional six years and from 1933 to 1936 as an operator of the Alabama Street plant [R. 518, 591, 592].

Cornett's description of the operation of the Alabama Street plant is consistent with that of appellant's own witness, Pearman, who testified that in the accused structure no pre-mixing or intermingling in the sense appellants assert, takes place [R. 255, 257, 263, 264] as previously discussed in this brief.

Cornett's description of the construction and operation of the Alabama Street plant is entirely consistent with that of Murasko and with the documentary evidence. In an effort to find some argument, appellants now claim that the mounting for the air ram for operating the cement hopper discharge gate would somehow prevent the hoppers from moving independently. Such an assertion is completely inconsistent with the testimony of the witness, Cornett, and the other testimony in the record [R. 594, 595]. Obviously, where several tons of material are involved, the presence of springs to hold the air ram would not affect the ability of the hoppers to move independently. Indeed, to adversely affect the ability of the hoppers to move independently, a monstrous spring would have to have been substituted for the light, flexible springs described by Cornett which merely functioned to permit a floating support for the ram.

The trial court, upon hearing the testimony, found correctly that the Alabama Street plant was constructed more than two years prior to the filing date of the patent in suit. The trial court also found that the Alabama Street plant utilized all of the structure of claim 1 of the patent that is an aggregate hopper, a cement hopper disposed therein and weighing means for each hopper and means connecting the hoppers with the weighing means so that each may move independently relative to the other. None of the so-called inconsistencies, none of which is admitted, detracts from the fact that the Alabama Street

plant included this claimed combination. The plant also clearly included all of the elements of claim 5 of the patent in suit, including the concentrically disposed discharges. The Court found that the tubular water discharge was within the skill of the art and did not amount to invention [Findings of Fact 20 and 21]. Clearly the evidence supports the findings of fact and they cannot be set aside as clearly erroneous. (F. R. C. P., Rule 52(a).)

## II.

### **The Trial Court Correctly Admitted Evidence Relative to the Alabama Street Plant.**

Appellant admits that it is within the discretion of the trial court under Title 35, U. S. C., Section 282, to admit proof of a prior use in the absence of notice thirty days prior to trial. It is appellant's contention that this discretion was abused.

In discussing whether or not the trial court abused its discretion, appellant proceeds as though only the parties involved are in interest. It is, however, axiomatic that in patent litigation the public interest is paramount. (*Hycon v. Koch* (9 Cir., 1955), 219 F. 2d 353.) The sales manager for the western states for appellant identified several other infringers of the patent in suit, Likens Manufacturing Company, Thompson Tank & Steel Company, LaValley Ready-Mix Conveyor Equipment Company [R. 275, 277], all in the Los Angeles area. If this patent is held valid and infringed, all will be subject to litigation on this patent.

The trial court was fully cognizant of this paramount public interest, however, and in the interests of fairness, the trial was continued more than thirty days to be certain that appellant had ample opportunity to uncover

any possible conflicting evidence. It is apparent that appellant has not in any way been prejudiced by the trial court's action. They have been prejudiced by the existence of the Alabama Street plant as it invalidates the patent in suit but in no way was appellant prejudiced by obtaining thirty days' continuance during the trial instead of before it to endeavor to disprove the existence of the defense.

Irrespective of the difficulties encountered by appellee's prior counsel referred to on pages 34 and 35 of appellant's brief and without conceding in any way any responsibility, therefore, this is hardly any justification for precluding establishing a defense in this suit particularly where the public interest and not that of the litigants is paramount. (*Hycon v. Koch (supra).*)

It is to be noted that appellee was once before precluded from establishing a similar defense when a timely motion for a continuance [R. 47] was opposed by appellant and denied by the trial court.

The appellant claims it was prejudiced by failure to obtain the thirty days' notice before trial, yet it admits it was unable to discover any rebuttal evidence from May 16, 1956, to April 23, 1956, the period during which the trial was continued for this purpose. The appellant argues it was not given adequate time to prepare for cross-examination, and yet the record is lacking any request for same. The record is lacking any request that the witness return April 23, 1956, for additional cross-examination. The appellant forced appellee to trial before appellee was fully prepared. It seeks to preclude proof of invalidity of its patent by relying upon a section of the patent act of 1953, which was amended for the obvious purpose of permitting the trial court to prevent just



what appellant seeks to do here. There was no abuse of discretion and no prejudice to appellant. If appellant had wished to assert surprise it should have moved for a continuance, otherwise, it waives this objection.

### III.

#### **The Trial Court Did Not Err in Permitting Introduction of the Documentary Evidence.**

Title 28, U. S. C., Section 1732(a), provides for the introduction in evidence of documents which by their nature are reliable and to be trusted and is a relaxation of a long-accepted exception to the hearsay rule. (*New York Life Ins. Co. v. Taylor* (C. A., D. C., 1944), 147 F. 2d 297.)

In the present instance, the records were taken from the files of the Bodinson Manufacturing Company. The president of that organization testified that such documents were made in the regular course of business and that it was the regular course of business to make such documents at the time of such act, transaction, occurrence or event.

Appellants base their objection to the introduction of said documents on the grounds that the witness was not with the company prior to 1940 and the documents in question were made in 1931. Appellee finds no such exception in the statute, nor any reported case supporting appellant's position. Appellee agrees that mere presence in the files does not render these documents admissible. The present instance, however, is clearly distinguishable in that the evidence establishes that the documents were made in the regular course of business and it was the regular course of business to make such records at the time of the act, transaction, occurrence or event.

Thus, the critical question presented is whether or not it is sufficient to permit introduction of such records to establish that an organization has constantly followed the same system of keeping records and that the documents in question were filed and retained in accordance with such system or is it necessary to produce a witness who was present at the instant the records were made and filed.

If this latter interpretation were correct, then all corporate records, no matter how inherently trustworthy they are, would be excluded from evidence as soon as they became of sufficient age that no employee who was present at the time same were made and filed would be available [R. 553].

The purpose of former Section 695 of Title 28, U. S. C., which formed a basis for this section was to eliminate the necessity for locating and calling as witnesses the individuals who kept the records.

*Ettelson v. Metropolitan Life Ins. Co.*, (3 Cir., 1947), 164 F. 2d 660;

*New York Life Ins. Co. v. Taylor* (C. A., D. C., 1944), 147 F. 2d 297, reh., 147 F. 2d 30.

The documents involved herein are such a nature as to be inherently trustworthy. It is certainly within the purpose of Section 1732(a) to permit introduction of such documents. The documents also fall within the literal language of the statute defining those documents which are admissible. Consequently, unless some exception not expressed in the statute and unsupported by any reported case appellee has been able to discover is evolved the documents, Exhibits A, and F through P were properly admitted into evidence.

### Conclusion.

The appellant in point IV of its brief asserts that infringement of the patent in suit is clear. This is controverted. If the claims are to be interpreted, as appellant contends, as limited to a device wherein the so-called pre-mixing or intermingling occurs, then this is not present in appellee's structure according to appellant's own witness Pearman [R. 255, 257, 263, 264]. In any event, the questions of validity and infringement are disputed and the case must be remanded for suitable findings. (*Yanish v. Barber* (9 Cir., 1956), 232 F. 2d 939.)

It is respectfully submitted that the judgment should be affirmed. The record clearly establishes the existence of the Alabama Street plant in 1931. The testimony of Murasko, Cornett, Bodinson and Exhibits A, and F through P establish this fact. The construction and operation of this plant openly and publicly in San Francisco in accordance with the alleged invention defined by claims 1 and 5 of the patent in suit is established by the testimony of Murasko, Cornett and Exhibits A and F through P. There can be no doubt of these facts and there was none in the mind of the trial court. Under the decision of this Court in *Whiteman v. Mathews* (*supra*) the oral testimony of Murasko and/or Cornett alone is sufficient. Exhibits A and F through P substantiate and corroborate this oral testimony but their exclusion from evidence would not alter the trial court's conclusion. There was no abuse of discretion in permitting proof of the prior public use, even if the Court had excluded same it would form the basis for a motion under Rule 59, Federal Rules of Civil Procedure, for a new trial so that appellant was in no way prejudiced. (*Jules D. Gratiot, et al. v. Farr Company* (9 Cir., 1956), Appeal No. 13,352.)

In view of the paramount public interest involved in patent litigation the Court adopted the most desirable course of permitting appellant to hear all of the evidence on the issue and then granted a period longer than the statutory period to appellant to endeavor to present conflicting evidence. This appellant admittedly could not do according to page 38 of its opening brief. Hence, the judgment of the trial court must be affirmed.

Respectfully submitted,

R. DOUGLAS LYON,

*Attorney for Appellee.*

No. 15249

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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C. S. JOHNSON COMPANY,

*Plaintiff-Appellant,*

*vs.*

MERLE W. STROMBERG, dba CALIFORNIA BATCHING  
EQUIPMENT Co., DOE I, DOE II, and DOE III,

*Defendant-Appellee.*

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REPLY BRIEF FOR PLAINTIFF-APPELLANT.

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*Defendant-Appellee.*

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## REPLY BRIEF FOR PLAINTIFF-APPELLANT.

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The Brief of the Defendant-Appellee demonstrates uncertainty that the prior use defense will be sustained and prudently discusses other possible defenses not seriously urged at the trial.

We submit this reply organized in terms of issues in the case.

### Statement of the Case.

#### The Trial Court's Decision.

Defendant claims (His Brief, p. 2) that the District Court expressly refused to determine, in the absence of the alleged prior public use, whether the Johnson patent was valid or infringed. Page 648 *et seq.* of the Transcript contains only an expression of the Court's desire to make sure what is invention, followed by an explanation of Defendant's counsel as to what he thought was or was not invention. Defendant makes no attempt to explain the Court's twice expressed statement [Tr. p. 650] that he was basing his decision on "*all the evidence in the case.*"

## POINT I.

### The Testimonial Record Is Highly Persuasive of Invention.

**Johnson's Patent Discloses a New Batching  
Apparatus Having a New Result.**

Among other things, Defendant is now trying to sustain a "Lack of Invention" defense. (His Brief, p. 2.) Without explanation and without attempt to apply them, he cites *A & P Tea Co. v. Supermarket Corp.*, 340 U. S. 147; *Park-In-Theatres v. Perkins*, 190 F. 2d 137; *Himes v. Chadwick*, 199 F. 2d 100; *Kwikset Locks v. Hillgren*, 210 F. 2d 483; and *Photochart v. Photo Patrol*, 189 F. 2d 625. None of these citations appears to be pertinent. The only thing common to them seems to be that in each instance an invention combining old elements was found not patentable because it failed to perform some new or different function. That is hardly the case here.

In our Main Brief we pointed out how the record established that Johnson taught the concrete batching art a new concept in batching apparatus by providing a concrete weigh batcher which would *intermingle* or *premix* the cement and aggregates at the discharge opening as they were discharged. Also pointed out were the many important advantages of intermingling the ingredients at the discharge opening. Detailed references were made to the record transcript to support the assertions. Stromberg now baldly says that the assertions do not represent the evidence as actually presented in the record, without attempting to point out a single instance of misrepresentation.

Instead, Stromberg argues, without explaining, that *premixing* or *intermingling* was not Johnson's contribution to the art because of Johnson's earlier patent No. 1,687,499, a file reference to the patent here in suit. Nowhere in that patent is there the slightest suggestion

of *premixing* or *intermingling* the ingredients. Instead, a ribboning or stratified feed is taught. The only other patent, Robb No. 1,750,244, relied upon by Stromberg at the trial has now seemingly been cast aside, no reference being made to it in Defendant's Brief.

Defendant's reliance upon the testimony of Pearman for establishing that there is no such *premixing* or *intermingling* is sheer nonsense. The closest scrutiny of Pearman's testimony [particularly Tr. pp. 255-257, 263-264, mentioned by Defendant] discloses not a word to that effect. What Pearman really did say was that any plant would give a good mix "but it may take just a little longer" under certain conditions [Tr. p. 256]. This was quite a concession from Pearman who was the owner of the infringing Stanton plant and obviously not friendly to Plaintiff.

Defendant tries to ignore that the Trial Court said he was "convinced" [Tr. pp. 366-367] that the aggregate and cement "commingled" at the discharge of the Stanton plant weigh batcher [Pltf. Ex. 14], which weigh batcher is strikingly similar to that illustrated in Johnson's patent.

The use of new elements in Johnson's invention is also ignored by Defendant. The record is devoid of evidence showing that a weigh hopper constructed to receive another independently moveable weigh hopper was old.

Defendant's manufacture and sale of batchers incorporating Plaintiff's invention is, by itself, evidence of invention.

Also, the commercial success of Plaintiff's invention appears to have been conceded. Defendant's Brief avoids discussion of the subject. This fact and the wide variety of the prior art devices shown in Defendant's Exhibit B are likewise indicia of invention. (*Stearns et al. v. Tinker & Razor et al.* (9th Cir., 1955), 220 F. 2d 49.)

### Validity of the Claims.

Defendant's assertion that the claims do not define patentable subject matter under the doctrine of *Reckendorfer v. Faber*, 23 L. Ed. 719, and *Willard, et al. v. Union Tool Co.*, 253 Fed. 48, is little short of frivolous. In the *Reckendorfer* case the pencil lead was used by itself, the eraser was used by itself and neither could be used together. In the *Willard* case the patentee was claiming in combination with a rotary drilling table a detached manually movable tool which was not used during the normal operation of the rotary table. Both sharply contrast with Johnson's weigh batcher where the two hoppers perform their weighing and discharging functions simultaneously and cooperate towards a single end, the premixing or intermingling of the cement and aggregates as they are discharged.

Defendant also seeks some comfort in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 93 L. Ed. 672, citing it in support of the proposition that "a new element or limitation cannot be read into a claim which would otherwise be invalid." Again, the pertinency of the cited case is not seen, particularly because there has been no showing that the claims "otherwise are invalid."

Defendant seeks to criticize Plaintiff's expert witness, Wright, for having made no tests. Defendant's own expert witness, Wisniski, without the benefit of tests was convinced that "with a better dispersion of materials, you probably wouldn't have to mix as long," and that where the cement is put in on top "they do get some building up of cement on the blades, I think, more than you would if you partially fed that cement in with the rest of the ingredients." [Tr. p. 440.]

## POINT II.

The Trial Court Erred in Finding the Evidence on the Apparatus at 235 Alabama Street, to Be Such, as a Matter of Law, as to Invalidate Claims 1 and 5 of Johnson Patent No. 2,138,172.

As pointed out in our Main Brief, pages 5-9, Johnson taught the art how to make a concrete weigh batcher which provided for *accurate* cement weighing and *pre-mixed* or *intermingled* the cement and aggregates *at the discharge* of the weigh batcher to *substantially eliminate dusting and gumming, pre-shrink the batch, and reduce the mixing time required in the concrete mixer.* The radical departure that was made from prior art structures is best represented by comparison with the devices of the prior art [Deft. Ex. B] which widely differ in construction and function and are presumably the best prior art found by Defendant.

In his Reply Brief Defendant continues to urge that an alleged prior public use of a belatedly found weigh batcher invalidated Johnson's claims 1 and 5, although Defendant's own witnesses proved that the alleged apparatus did not bring to the art the teaching that Johnson did.

### **Murasko's Testimony.**

On pages 23 and 27 of our Main Brief we pointed out that Murasko did not even suggest that the Alabama Street batching apparatus premixed or intermingled the concrete ingredients as they were discharged. We also pointed out that Murasko said it made no difference as to how the ingredients were introduced into the small one yard mixer they had at that plant. Defendant's Brief says nothing to the contrary. Also, Defendant makes no attempt to explain Murasko's statement that Cornett operated the plant "probably for six years before I left

there" [Tr. p. 515], which statement in effect means that Cornett never saw the apparatus until 1936, a date too late to invalidate. (Our Main Brief, pp. 23-24.)

#### **Cornett's Testimony.**

Plaintiff's attempt to obtain some conflict in Cornett's testimony was successful. As we pointed out (our Main Brief, pp. 23-24) Cornett made it very clear that he and Murasko worked together (in the sense that they worked for the same company) for a period of 12 years, and that it was only a period of 6 years during which he worked as an operator in the plant with Murasko as his superintendent [Tr. pp. 591-592]. Cornett made it very clear that he worked inside the batching plant in no other capacity.

Defendant makes no attempt to explain the above. Instead he asserts without explanation that we have a misconception of the testimony, and that the correct interval is the unsupported 1933-1942 interval testified to on page 530 of the Transcript. If this 9 year interval were correct, it remains to be explained why Cornett said that "nine years" didn't mean a thing to him [Tr. p. 593].

More importantly, Defendant's Brief is silent about Cornett's having been quite positive in stating that the cement and aggregate did not intermingle or mix at the discharge gate and *only mixed down in the chute*. (Our Main Brief, p. 24.)

#### **Bodinson's Testimony and the Documentary Evidence.**

In our Main Brief, pages 25-26, we pointed out that Bodinson testified that he had nothing to do with Defendant's Exhibits A and F through P at the time they were made, that he had never compared them with the Alabama Street plant, and that the batching apparatus was



covered with galvanized sheeting. We also pointed out a number of instances in which the Documentary Exhibits did not conform to the testimony, particularly pointing out that Defendant's Exhibit K indicates that the Alabama Street plant had a single hopper containing an *integral cement compartment* instead of a *separate cement hopper*.

Defendant's only comment (His Brief, p. 9) regarding the above is that our "interpretation of Exhibit K is erroneous and not in accord with any of the testimony in the record." Of course it's not in accord with any of the testimony. No attempt whatever is made to explain why the interpretation is erroneous.

**The Conflicting Evidence Relating to the Alabama Street Plant Does Not Support the Findings of Fact.**

On pages 27-29 of our Main Brief we pointed out how the conflicting evidence did not support many of the Findings of Fact made by the Trial Court. Defendant's argument to the contrary (His Brief, p. 9) is surprising and inaccurate.

As concerns the premixing or intermingling action, Defendant continues to claim "the record fails to establish that in any Johnson-type plant such action takes place." However, the Stanton plant [Pltf. Ex. 14] is clearly a "Johnson-type" plant and as to it the Court was "convinced" that the materials "commingled" [Tr. p. 367]. According to Webster's New International Dictionary (2d Ed., 1956), "commingled" is defined—"to mingle together; to mix intimately; blend."

Defendant further argues that his infringing "structure follows the teaching of the prior art." What prior art? Certainly not that of the alleged Alabama Street plant. Defendant makes no claim of knowing about that apparatus more than a week prior to the trial.

Defendant's conjecture to the effect that mounting the cement gate air ram on springs would not adversely affect the ability of the hoppers to move independently is preposterous. His own witness, Cornett, testified that this construction would affect the setting on the scales [Tr. p. 596]. Moreover, if so little effort is required to actuate a gate there would appear to be little sense in using an air ram to provide the effort.

Regarding his having met the required burden of proof, Defendant places his sole reliance upon *Whiteman v. Mathews* (9th Cir., 1954), 216 F. 2d 712. The facts of that case are readily distinguished from those of the instant case, and we also submit that the Defendant has failed to meet the test set forth in that case. (Our Main Brief, p. 20.)

In the *Whiteman v. Mathews* case (*supra*), the following conditions existed—(1) There was no question about the details of the anticipating device which was in the courtroom. (2) Spencer, the man who made the device was called as a witness. (3) The device was used publicly at various jobs. (4) Some of the plaintiff's witnesses testified that they had seen the anticipating device only two years after the year it was alleged to have been used. (5) Spencer's testimony was not contradicted on any important point, and (6) There was no question about Plaintiff having notice of the device prior to trial.

None of the above conditions are found in the instant case, instead (1) There is considerable doubt about the construction of the alleged anticipating device which, according to Defendant's witness, was destroyed nine or ten years ago; the only physical evidence regarding it was some conflicting drawings and papers alleged to have been found in the files of an equipment manufacturer. (2) The maker of the device did not testify. (3) The alleged device was screened from public view. (4) The

Defendant himself made no claim of knowing about the device more than a week prior to the trial. (5) There was considerable contradiction in and between the testimony and documentary evidence, and (6) There was no opportunity to prepare for the surprise evidence.

Defendant (His Brief, pp. 5-6) tries to find some comfort in the fact that Plaintiff offered no evidence to the contrary regarding the alleged Alabama Street plant. Plaintiff did not have to because Defendant's own witnesses offered more than enough evidence to the contrary. Defendant also claims (His Brief, p. 6) that we have not pointed to any evidence in the record tending to disprove the construction of the Alabama Street plant—almost as if pages 22-29 of our Main Brief had not been written.

**The Validity of Claims 1 and 5 Is Clear. Defendant Himself Argues for Lack of Anticipation.**

In our Main Brief, pages 30-32, we pointed out why the evidence does not invalidate the claims. The discussion included a detailed explanation as to why the Alabama Street apparatus, if it existed, fails to meet specific claim requirements. Defendant counters by calling the inadequacies and conflicts of the record “so-called inconsistencies” which don't detract from the fact that the Alabama Street plant included the claimed combination. Invalidating claims would indeed be a simple matter if the short comings of one's proof could be overcome by the simple expedient of terming them “so-called inconsistencies.”

We have also pointed out how the alleged Alabama Street apparatus failed to teach the “commingling” action taught by Johnson and the benefits that flowed therefrom. In this respect the Defendant now makes a vital argument in our favor. In his Brief, page 15, he argues there

is no infringement because "If the claims are to be interpreted, as appellant contends, as limited to a device wherein the so-called premixing or intermingling occurs, then this is not present in appellee's structure according to appellant's own witness Pearman."

Defendant is arguing for a double standard of claim interpretation, one standard for validity and a second for infringement. We submit that this is fatal to his case. He cannot contend that the Stanton plant does not infringe because it has no premixing or intermingling, and at the same time argue that the same claims are anticipated by an apparatus which did not have premixing or intermingling. If a device does not infringe, if earlier, it would not anticipate. (*Charles Peckat Mfg. Co. v. Jacobs* (7th Cir., 1949), 178 F. 2d 794.)

### POINT III.

**The Trial Court Clearly Abused Its Discretion by Admitting Any Evidence Relative to the Alabama Street Plant, Despite Lack of Notice Under 35 U. S. C. 282.**

The law (35 U. S. C. 282) which the trial judge was administering and applying in the present case is a rule of procedure relating to notice. This, as stated in our opening brief at page 37, is an important right and no technicality. Important reasons behind the law are to *prevent delays* (*The Philadelphia and Trenton Railroad Co. v. Stimpson*, 39 U. S. 448 at 459, 14 Peters 535 at 541 (1840), page 37 of our opening brief) and to give a plaintiff an opportunity to adequately *prepare for cross-examination*. That preparation for cross-examination was particularly important in the present case was pointed out on page 39 of our opening brief. In McCormick, Evidence, 1954 Edition at page 57, it is stated that "Preparation is the golden key. Movie-goers and readers of

detective fiction are likely to suppose that successful cross-examination is the product of intuition, inspiration, and flashes of telepathic insight. . . . Today the stress is upon thorough preparation. . . .”

**Diligence Must Be a Requirement for Admission of Evidence  
Despite Lack of Notice Under 35 U. S. C. 282.**

The above and other reasons behind the law necessitate a holding that *diligence*, not merely substantive merit, must be essential to admission of evidence despite lack of notice under 35 U. S. C. 282. If substantive merit alone were enough, a party would risk nothing by failure to give the statutory notice—whether such failure were intentional or were the result of grossly negligent and dilatory trial preparation. If such party’s evidence proved to be persuasive, he would win, and if not, he would have lost nothing by his failure to give notice. The statute would be emasculated.

Defendant, on page 15 of his brief, makes reference to the analogous situation in which an attempt is made to re-open a case under Rule 59, Federal Rules of Civil Procedure, because of newly discovered evidence. With relation to such rule the *courts* have imposed the requirement of *diligence*. In Moore, Federal Practice and Procedure, Volume 6, page 3785, it is stated that: “To warrant a new trial the . . . movant must have been excusably ignorant of the facts, *i. e.*, the evidence must be such that it was not discoverable by diligent search.”

Also, in Federal Practice and Procedure, Rules Edition, Barron and Holtzoff, Volume 3, Section 1305, pages 238-239, it is stated relative to Rule 59 that “The movant for a new trial must show due diligence in discovering such evidence. He is required to rebut the presumption that there has been a lack of diligence.”

Some of a long line of cases supporting the above quoted statements are as follows: *Toledo Scale Co. v. Computing*

*Scale Co.*, 261 U. S. 399, 43 S. Ct. 458, 67 L. Ed. 719 (U. S. Sup. Ct. 1923); *Norwich Union Fire Ins. Soc., Limited v. Glasser*, 224 F. 2d 385 (C. A. 9, 1955); *United States v. Bransen*, 142 F. 2d 232 (C. A. 9, 1944); *Silva v. United States*, 38 F. 2d 465 (C. A. 9, 1930); *Twenty-One Mining Co. v. Original Sixteen to One Mine*, 265 F. 469 (C. A. 9, 1920); *General Electric v. Minneapolis Honeywell*, 35 Fed. Supp. 35 (D. C. N. Y., 1940), Revd. on other gnds, 118 F. 2d 278.

The situation relative to *Jules D. Gratiot, et al. v. Farr Company*, cited by Defendant on page 15 of his brief, is not reported and is not fully known to Plaintiff. Plaintiff has, however, ascertained from attorneys involved in that case that a showing of diligence was required.

#### **Defendant Was Not Diligent.**

That Defendant in this action was not diligent, but instead was grossly dilatory and negligent in his trial preparation over a period of many months, was pointed out in our opening brief at pages 34-36. Also, Defendant and his present attorney were not diligent (our opening brief, p. 39) in giving to Plaintiff what notice was actually available after the evidence was discovered—apparently as the result of a flurry of last-minute activity. *Defendant does not even claim to have been diligent.*

The trial judge, in admitting the un-noticed evidence, ignored all of the above-stated considerations. Instead, he apparently thought that justice would be done if he believed the substantive evidence [Tr. p. 499]. This, it is respectfully submitted, was like thinking that an illegal search and seizure is all right in any situation in which marijuana is discovered.

**Defendant Should Not Be Permitted to Escape  
the Consequences of His Lack of Diligence.**

Defendant, in his brief, makes repeated attempts to put the shoe on the other foot and make Plaintiff appear in a bad light. He says that he was “forced” to trial (p. 12) before he was fully prepared—but this was nineteen months after the action was filed and over three years [Tr. pp. 27-28] after Defendant received written notice of infringement. He also intimates (His Brief, pp. 12-13) that Plaintiff should have moved for a continuance when the Alabama Street plant was first mentioned, and that the objection is waived because of Plaintiff’s failure to so move. The answer to this is that Defendant had cried “wolf” before and failed to back it up, and Plaintiff had every reason to suppose that this was merely another attempt at stalling. Furthermore, and most importantly, it is a *non sequitur* to say that Plaintiff “waived” a rule designed to prevent delay (*The Philadelphia and Trenton Railroad Co. v. Stimpson, supra*) by failing to ask for a delay.

Finally, Defendant asserts (His Brief, p. 12) that Plaintiff was not prejudiced since he could have called the witnesses back for additional cross-examination. That this would not have removed the prejudice (even if the trial judge would have permitted it, and even if the witnesses could have been enticed back into the jurisdiction of the trial court) is believed to be clear from the following statement of Judge Stone in *State v. Saporen*, 205 Minn. 358, 285 N. W. 898 (1939): “The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the

testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth." Thus, delayed cross-examination would have been relatively ineffective and, again, would have been contrary to the statutory purpose of preventing delay.

#### Summary.

To summarize, the trial judge did not exercise any discretion at all relative to the procedural statute here under consideration. Instead, he merely substituted his own beliefs as to the merits of Defendant's substantive defense. The trial judge gave no consideration to the questions of diligence by Defendant, or by his present counsel who failed to give Plaintiff what notice was available [Tr. pp. 157 and 160] and thus afford Plaintiff some chance to conduct an effectual cross-examination based on studied knowledge of the numerous shop drawings and orders in evidence. Furthermore, as stated in our opening brief at pages 40-42, the trial judge was acting under a misapprehension as to the effect of expiration of the patent.

Good judicial precedent should give to future defendants in patent cases an incentive to be reasonably diligent in their trial preparation—to the end that litigation be shortened and not protracted as the present case has been. It is pointed out that if the present Defendant is not caused to suffer detriment as the result of his actions, future defendants in other patent cases will be able to flout the



statute with impunity, and defeat the public interest in shortening litigation. Any hardship in a particular case should not weigh against the sound principle that non-diligent defendants should be penalized and litigation consequently shortened, to the benefit of the public (*Toledo Scale Co. v. Computing Scale Co.*, *supra*, 261 U. S. 399 at 424-425).

The public policy of shortening litigation, and in providing fair hearings, is in no sense outweighed by the policy expressed in the *Hycon* case (*Hycon v. Koch*, 219 F. 2d 353), cited by Defendant on page 11 of his brief. In that case a *newly issued* patent was ruled upon, in a summary judgment, without benefit of any actual trial. In the present case an *expired* patent was the subject of an extended trial, and the question presented relates to failure by one party to comply with an express statute. No third party will be affected, as to his future conduct or liability for future actions, by the outcome of the present litigation. If the Alabama Street Plant were an anticipation, any persons who infringed the present patent before it expired would have a perfect defense to any possible future suit by Plaintiff. Also, as emphasized in our opening brief at page 37, the very defense which Defendant is trying to raise is anomalous, and contrary to the basic public policy of promoting the progress of the arts by rewarding inventors who *inform* the art as to their inventions.

The above considerations demand permanent exclusion of all evidence relative to the Alabama Street plant.

#### POINT IV.

### The Trial Court Erred in Permitting Introduction of the Documentary Evidence.

In our Main Brief, pages 43-46, we explained that Defendant's Exhibits A and F to P, inclusive, were identified as papers found in the files of Bodinson Mfg. Co., and that this is not enough to render them admissible.

Defendant agrees (His Brief, p. 13) "That mere presence in the files does not render these documents admissible." In the face of his admission that the witness Bodinson was not with the company prior to 1940 and that the documents bear dates around 1931, Defendant baldly argues "That the evidence establishes that the documents were made in the regular course of business and it was the regular course of business to make such records at the time of the act, transaction, occurrence or event." What evidence? Defendant doesn't identify it. Certainly it wasn't the testimony of Bodinson who admitted that he had nothing to do with the documents, or company policy, prior to 1940. Bodinson did not and could not have testified that *such* documents were made in the regular course of business at the time in question, and he certainly NEVER TESTIFIED THAT DEFENDANT'S EXHIBITS A AND F-P WERE MADE IN THE REGULAR COURSE OF BUSINESS. This is because he wasn't around at the time alleged or for many years thereafter.

Relative to page 14 of Defendant's brief, first two paragraphs, it was *not* established that the organization constantly followed the same record keeping system. Bodinson, the only witness, was not present during *nine* intervening years. Also, we are not talking about General Motors Corporation, but about a new local company founded only eleven years [Tr. p. 548] before the time in question.

Defendant seeks to ignore that these exhibits purport to be nothing more than indications of what someone might have been proposing for future action. He tries to bring them into the class of documents, ledgers, books of accounts and the like, which have been made exceptions to the hearsay rule because they are objective "observations" of current or past events.

Defendant cites *New York Life Ins. Co. v. Taylor* (C. A., D. C., 1944) 147 F. 2d 297, as authority for admitting the exhibits. Quite the contrary is true. In that case the Court EXCLUDED the records, psychiatric reports, because they were not an "automatic reflection of observations." The following excerpts from the Opinion on Rehearing in that case appear to be particularly pertinent.

"The records offered here are not the kind of entries which are admissible under the established principles of the Shop Book exception to the hearsay rule. Such records must be those which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic reflection of observations."

"In other words, it is not the absence of a motive to misrepresent which is the basis of the Shop Book exception to the hearsay rule. Purely clerical entries come within the rule regardless of the fact that the party making them has an interest in what they may be used to prove. Conversely *where the accuracy of the entries depends on opinion, conjecture or judgment in selecting the particular entries from a larger mass of data which some other observer might consider equally important*, the entries are not within the Rule regardless of motive."

"Today every great corporation is making thousands of records, obtaining credit information, making psychological examinations of its employees, hiring efficiency experts

and recording the activities of its personnel. To admit this potpourri on the sole tests of regular recording and absence of motive to misrepresent would be a drastic impairment of the right of cross-examination. In a criminal case it is doubtful whether such a deprivation of the right of the accused to be confronted with the witnesses against him would be constitutional."

Defendant also cites for authority the case of *Ettelson v. Metropolitan Life Ins. Co.* (3 Cir., 1947), 164 F. 2d 660, although we are unable to understand why. In that case the person who made and kept the records was called as a witness.

## POINT V.

### Defendant's Infringement Is Clear.

Regarding our assertion (p. 47 Our Main Brief) that infringement is clear, Defendant simply says "This is controverted," (His Brief p. 15), without explanation as to where or why. As previously mentioned (This Brief pp. 9-10) he then goes on to argue that there is no infringement because the claims must be given a limited interpretation. He says, "If the claims are to be interpreted, as appellant contends, as limited to a device wherein the so-called premixing or intermingling occurs, then this is not present in appellee's structure according to appellant's own witness Pearman."

Defendant is arguing for a double standard of claim interpretation, one standard for validity and a second for infringement. This he cannot do. Moreover the Trial Court was "convinced" that the Stanton apparatus had "commingling." (This Brief pp. 3, 7.)

Other than the above, Defendant presents no disputed issue of fact on infringement. We submit that infringement can be and should be determined here in one single appeal.

## POINT VI.

### There Is No Necessity of a Remand to the Trial Court for Further Findings.

On pages 47 and 48 of our Main Brief we pointed out that it is to be presumed that the District Court did not believe the claims to be invalid over the prior art patents and publications because after stating that it was basing its decision on "all the evidence in the case," it based its Findings relating to the validity and infringement solely upon the Alabama Street plant.

Defendant does not attempt to explain this action on the Court's part. Instead, he merely says "The record is full of conflicting testimony on the presence or absence of invention and infringement," and must be remanded for appropriate decision. (His Brief p. 4.) But where are the conflicts on invention and infringement? Defendant doesn't point to a single one. Defendant's unsupported assertion (His Brief p. 15), that "questions of validity and infringement are disputed" does not make them so.

We respectfully urge that the record is complete and that no genuine issue as to any material fact is presented. Thus, if the complained of Findings and Conclusions are found to be in error, the mere fact that the District Court expressed no Findings on an issue does not necessitate a remand. (*Yanish v. Barber* (9 Cir., 1956), 232 F. 2d 939.

Even if there is a dispute as to validity or infringement, no remand is necessary where the record is complete and the situation is clear. (*Hazeltine Research, Inc. v. General Motors*, 170 F. 2d 6, 10 (C. A. 6, 1948), and *Moore's Federal Practice* (2d Ed.), Vol. 5 at p. 2662, both cited in *Yanish v. Barber*.)

### Conclusion.

The final judgment of the District Court should be reversed and the case remanded with instructions to make an accounting of damages in favor of Plaintiff, The C. S. Johnson Company.

It is also respectfully urged that Plaintiff be awarded costs and attorney's fees. In this matter, the attention of the Court is invited to pages 650 and 651 of the Transcript.

Respectfully submitted,

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No. 15249

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

C. S. JOHNSON COMPANY,

*Plaintiff-Appellant,*

*vs.*

MERLE W. STROMBERG, dba CALIFORNIA BATCHING  
EQUIPMENT CO., DOE I, DOE II, and DOE III,

*Defendant-Appellee.*

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## PETITION FOR REHEARING.

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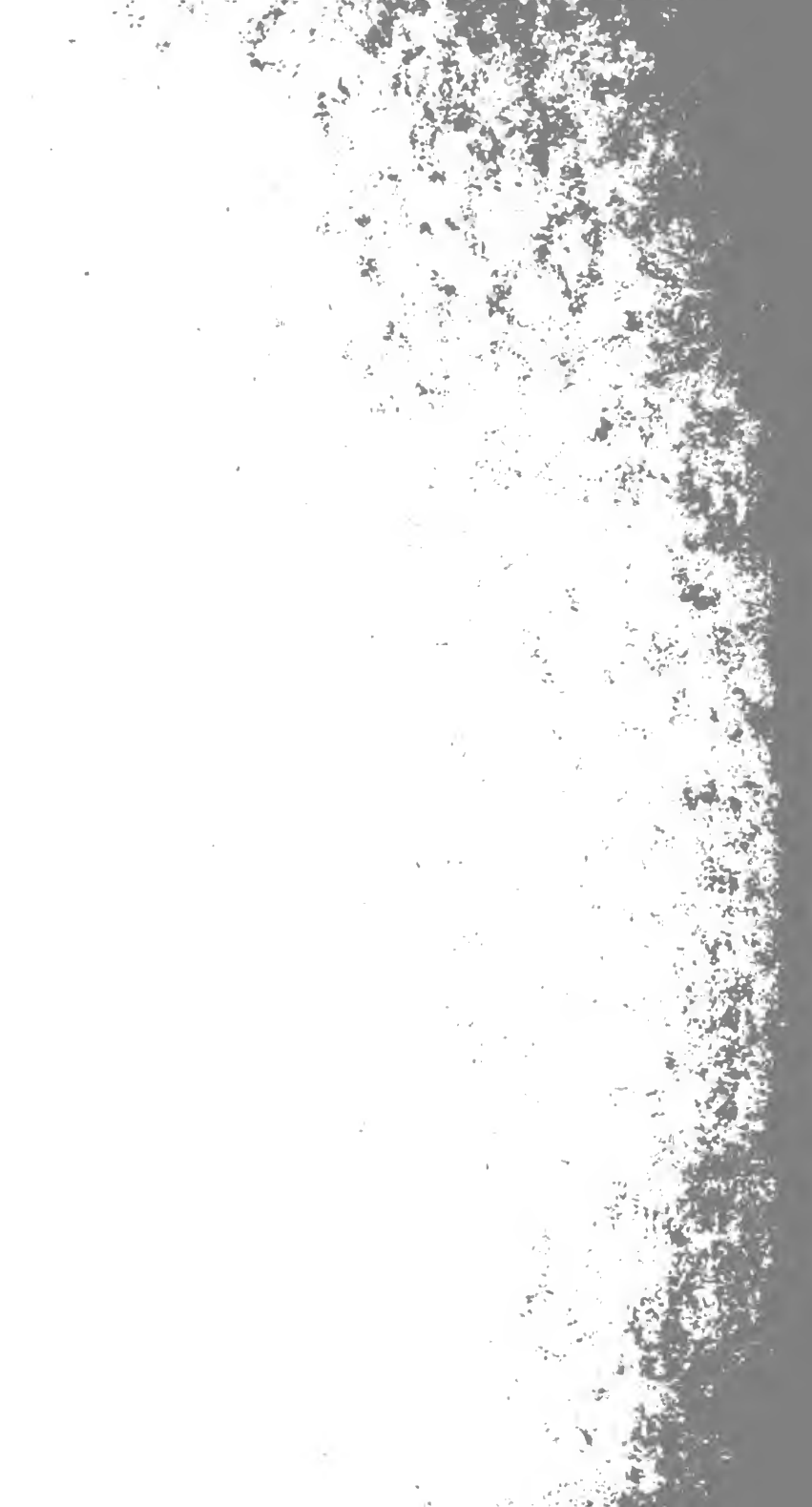
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PAUL P. O'BRIEN, CLERK





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EQUIPMENT Co., DOE I, DOE II, and DOE III,

*Defendant-Appellee.*

---

## PETITION FOR REHEARING.

---

*To the Honorable Judges Albert Lee Stephens, Richard  
H. Chambers, and Stanley N. Barnes of the United  
States Court of Appeals for the Ninth Circuit.*

Comes now the appellant and petitions this Honorable Court for a rehearing of this appeal, upon the grounds hereinafter set forth.

This petition is submitted for the principal purpose of asking the Court to reconsider points of law controlling here. Equally important, this petition asks the court to reconsider rulings of law which have an effect far beyond the confines of this case, and, indeed, beyond the confines of the Patent Law.

### Questions On Which Reconsideration Is Sought.

This petition requests reconsideration of the following questions of law:

1. DOES A PURPORTED PRIOR USE INVALIDATE A PATENT CLAIM, WHERE THERE IS NO SWORN TESTIMONY OR

DOCUMENTARY EVIDENCE TO SUPPORT THE SPECIFIC COMBINATION OF ELEMENTS CLAIMED, AND NO EVIDENCE THAT THE FUNCTION OF THE INVENTION WAS PERFORMED?

It is our position that the rule of the barbed wire case (143 U. S. 275) should be followed. Such rule requires proof beyond a reasonable doubt as to the invention claimed, not merely pieces thereof.

2. DOES 35 U. S. C. 282 (4) PERMIT FOR INVALIDATING A PATENT THE INTRODUCTION OF PROOF ON AN UNNOTICED PRIOR USE BY WITNESSES WHOSE IDENTITY IS INTENTIONALLY WITHHELD UNTIL THEY ARE PUT ON THE STAND, WHERE THE TRIAL COURT SETS NO TERMS ON WHICH SUCH PROOF CAN BE MADE AND ONLY AFTER TRIAL GRANTS PLAINTIFF AN OPPORTUNITY TO INVESTIGATE?

Our position is that the ruling of this Court reads out of the Patent Laws, Section 282 (4) of the Title 35 U. S. C. The only inducement left for a defendant in a patent case to observe that section of the statutes is that this Court may in the future change its interpretation.

3. ARE SELECTED DOCUMENTS FOUND IN THE FILES OF A THIRD PARTY ADMISSIBLE UNDER 28 U. S. C. 1732 (a) TO PROVE THAT A SPECIFIC APPARATUS WAS PUBLICLY SOLD AND USED, WHERE THE DOCUMENTS WERE PURPORTEDLY MADE BEFORE THE APPARATUS WAS EVEN BUILT, AND ARE IDENTIFIED ONLY BY TESTIMONY OF REGULAR BUSINESS PRACTICE AS IT EXISTED NINE YEARS LATER?

Our position is that Section 1732(a) of Title 28 U. S. C. makes documents, commonly classified as business records, admissible to prove a particular act or transaction only if they are a recording of the art sought to be proved, and are shown to have been *made* in the regular course of business and *at the time of making* it was the regular course of business to make them.

## ARGUMENT.

### I.

#### First Question.

**A Prior Use to Invalidate Must Teach  
the Complete Invention.**

It is our position that the following decisions should control the facts of this case:

“It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.” *Topliff v. Topliff and Another*, 145 U. S. 156, 161. (Quoted by this Court with approval in *Bianchi v. Barili*, 168 F. 2d 793 (78 U. S. P. Q. 5).

To the same effect:

“A prior use which requires modification to perform the function of the patent attacked is no anticipation. *Babcock & Wilcox Co. v. Springfield Boiler Co.*, 16 F. 2d 964, 969 (C. C. A.-2).” *Motor Improvements Inc. et al v. General Motors Corp., et al* 49 F. 2d 543 (C. C. A.-6) (9 U. S. P. Q. 360).

On the facts of this case, the so-called “Alabama Plant” did not embody the invention of the patent in suit. In its opinion, the Court gave no indication that it had made an independent interpretation of the claimed invention in relation to the alleged prior use.

**The Inventive Contribution of Johnson Is the  
Commingling of Free Falling Concrete Making  
Material at the Discharge of the Weigh  
Batcher and During Free Fall.**

Throughout the patent in suit the words commingling, pre-mixing, and intermingling are used synonymously to denote the commingling of the cement and aggregates which occurs *at the weigh hopper discharges and during the free fall* of such materials from the weigh hoppers to the collecting cone. The advantages of this are set forth in the Court's opinion. (Op. p. 2.)

The concept of commingling of the aggregates and cement at the batcher discharge is not an after thought, but on the contrary, the patentee states in the introductory paragraphs of the patent (p. 1, col. 1, lines 42-49):

"In other words, practically speaking, the cement hopper and the main hopper for the other aggregates to be *commingled* with the cement are *separately suspended* from the respective scale means employed therefor and are *independently movable* in the *independent weighing* operations to be performed for the contents of each hopper."

And as a result:

"Under the use of the invention, a certain amount of improvement by *pre-mixing* or *intermingling* of the materials is effected after they are batched and *before they ever reach the mixing apparatus proper* in which the *final* mixing operation is to be performed." (P. 1, col. 2, lines 37-43.)

The described physical structure of the drawings to accomplish this is recited as follows:

"When the discharge gates 22 and 23 are opened it will be apparent that the cement being disposed so as

to discharge downwardly between and *into* the other aggregates of sand, fine rock, and coarse rock, will be *intermingled* with and fill the 'voids' of the latter as the various aggregates pour out of the discharge for the hopper 7, adjacent to the gate 23. This *commingled* action involves in part the principle of the gravitational mixing method previously referred to herein, and consequently some *pre-mixing* and shrinkage of the over-all batch, and effects other practical advantages in the employment of the apparatus under conditions of service." (P. 3, col. 1, lines 27-41.)

The patentee carries the concept of commingling a step further in the provision of a concentric water shroud.

"The *intermixing of the water and dry aggregates*, where brought together, is highly efficient because the precipitated water enters the flowing shaft of dry aggregates *from all sides thereof* to penetrate and commingle with said dry aggregates." (P. 3, col. 2, lines 42-47.)

**Defendant Has Not Contended That the Record Supports Its Claim That the Invention Was Present In the "Alabama Street Plant."**

Defendant at most asserts that its witnesses testified that the "Alabama Plant" had:

1. A cement hopper within an aggregate hopper.
2. Each suspended from separate scales.
3. The hopper discharges were concentrically disposed.
4. The hopper discharges were one above the other.

Defendant has made no assertion that the testimony of Murasko or Cornett adds any more. (Deft. Br. pp. 7-8.)

Indeed, Vornett's testimony negatives any claim that the inventions of the patent in suit were in the "Alabama Plant." Cornett testified:

"Q. Well, what I want to learn is whether or not the cement falling out from your cement hopper fell into the streams of aggregates falling from the aggregate hopper? A. No, it did not." [Tr. p. 535.]

Again, at pages 539 and 540:

"Q. Yes, this is where they first strike. In your construction, did they strike up here at the top? Did they intermingle or mix right here at the gate? A. Not until the chute.

Q. Not until they hit way down here? A. Yes.

Q. So, in the construction of your plant, the actual mixing of the cement and the aggregate took place at a point I am going to mark X on this drawing I have just made, is that correct? A. That's right."

The point "X" is on Plaintiff's Exhibit 20 where it appears down in the collecting cone and not at the discharge of the batcher.

The witness Murasko said not one word about commingling at the discharge or during the free fall, or at any other place.

**The Record Is Devoid of Fact Testimony That the Hoppers of the Alabama Street Plant Were Independently Movable.**

Nor is there any testimony by the only two fact witnesses produced by defendant that in the Alabama plant, "each hopper may move *independently* relatively to the other and the materials contained therein" (Claim 1 in suit), or that there were "means whereby \* \* \*



cement \* \* \* and \* \* \* aggregates \* \* \* may be accurately measured *independently*.” (Claim 5.) The only factual testimony here is that the “Alabama Plant” had separate hoppers one within another and separate scales for each. Such testimony as there is on the topic, is again, contrary to a holding of anticipation. It was Cornett, defendant’s witness, who testified the cement hopper was tied to the aggregate hopper by springs. [Tr. pp. 594-596.]

Defendant recognized the failure of his prior use defense on the testimony of Cornett. To avoid it, defendant’s attorney asserts, without the benefit of oath or qualification, that the testimony of Cornett as to the springs makes no difference as a matter of fact. (Deft. Br. p. 10.) If it be a fact, let defendant prove it in accordance with the principles of judicial procedure. Patent cases are not such unique litigation as to permit findings without support of the record.

**Claim 5 Must Be Considered  
Separately From Claim 1.**

It is respectfully pointed out that the Court, in its opinion, made no mention of claim 5 except to quote it in a footnote.

It does not require citation that claims are to be separately considered, and that the validity of claim 1 has nothing to do with the validity of claim 5.

Claim 5 spells out, *in great detail*:

(a) *Commingling* of the cement and aggregates *at the hopper discharges* and *during the free fall*, and

(b) The *water ring* directing water *at an angle* into the falling shaft of cement and aggregates.

Relative to (a), the absence of any commingling during the free fall at the Alabama Street Plant was established by Defendant's witness, as pointed out previously herein. It was testified by Cornett that the cement and aggregates did not come together until the collecting cone or chute.

Relative to (b), Defendant has not merely appropriated a water ring, but the *exact angle-type* water ring described in the patent and *specifically* spelled out in claim 5. As will next be demonstrated, this feature of claim 5 was also not anticipated.

In view of the above, how can the findings relative to claim 5 be regarded as anything other than obviously erroneous?

**The Record Is Devoid of Any Teaching of the  
Commingling of Dry Materials and  
Water During Free Fall.**

Defendant's record negatives any suggestion, teaching or idea of the "water ring" of Johnson's invention. The "Alabama Plant" didn't have it. The witness Murasko testified:

"The Court: How was the water inserted into the mix? Just one stream?

The Witness: One steady stream.

The Court: Just one steady stream?

The Witness: That's right. The weighed water would discharge." [Tr. p. 492.]

Again, from Cornett's testimony [Tr. p. 591]:

"Q. In other words, you simply dumped a stream of water into the hopper L down at the bottom, just a single stream of water? A. That's right.

Q. You didn't try to encircle the aggregate stream with the water? A. No.

Q. Just dumped it right in? A. No. The water went into the mixer proper."

*There is not a scintilla of evidence in the record that the water ring is not an inventive and valuable contribution to the art.* On the contrary, its value was recognized by the Patent Office, and proved by plaintiff's witness. [Tr. p. 110.]

To find a combination is obvious, both the Patent Law and common sense demand at least a spark of a suggestion by another. Here the scintilla is missing.

**Defendant Himself Tacitly Concedes That the Alabama Street Plant Does Not Anticipate Claims 1 and 5.**

Defendant also recognizes (p. 15, his brief) that if the claims are to be interpreted "as limited to a device wherein the so-called premixing or commingling occurs," there would be no infringement by a structure in which the premixing or commingling was not present. Since "that which does not infringe, if earlier, would not anticipate" (*Charles Peckat Mfg. Co. v. Jacobs* (7th Cir., 1949), 178 F. 2d 794), there can be no anticipation by the Alabama Street plant.

The invention here is not broadly the placing of a hopper within a hopper. There is no question about what Johnson was trying to do and teach. He wanted to provide a weigh batcher with a new and better type of discharging action. He certainly did not just want to make a "hopper within a hopper" but contributed to the concrete industry a new form of batching apparatus having a discharging action never before achieved. Claim 1,

properly construed, is limited to the invention, Johnson's contribution. Claim 5, without argument, is so limited.

The Alabama Street plant simply does not meet the time honored requirements for anticipation as stated in *Acme Flexible Clasp Co. v. Cary Mfg. Co.*, 96 Fed. 344 (aff'd by C. C. A. 2 in 101 Fed. 269).

“Such alleged anticipation, whether by foreign printed publication or physical presence in this country, must so embody the complete patented article, or be so substantially like it, that a specification could be based thereon.”

We request the Court to reconsider its ruling that a prior use is an anticipation where the record is devoid of evidence that it operates in the same manner and has all of the elements or equivalents of the claimed invention.

## II.

### Second Question.

**The Holding of This Court Vitiates the Provision of Section 282 (4), Title 35, U. S. C.**

It is seldom that the decision of a single patent case has implications much beyond its own special set of facts. In the present case however, this Court has laid down broad rules of procedure which reach well beyond the bounds of this case.

The holding of the Court on the matter of notice under Section 282(4), Title 35, U. S. C. has given a carte blanche to litigants to disregard the requirements of that section. This in spite of the fact that Revised Statute 4920 was modified when codified in Section 282(4), Title 35, U. S. C. to insure a fairer trial to the patentee. It was the intent of Congress to require 30 day notice not

only of the prior art documents, uses, and sales offered as anticipations, but those offered to show state of the art as well.

**Defendant Here Schemed to Deny  
Plaintiff a Fair Trial.**

Contrary to the intent of the statute, a more carefully devised scheme by a defendant to deceive and conceal could hardly be imagined than that practiced by the defendant in this case. Defendant knew of the evidence to be offered during the week preceding trial, but kept it secret. Defendant not wanting to give plaintiff a chance to ask for a postponement, held back until after trial had started, until after plaintiff's first witness had testified. Then and only then did defendant announce it had a prior use, not previously noticed. And even then, defendant gave no notice of the names and addresses, as required by statute, but preferred to hide behind a vague representation that he had in mind some plant in San Francisco. [Tr. p. 157.]

On the last day of the trial the unnamed witnesses appeared. Even then they were not the mysterious owner and operator from San Francisco which defendant had represented to the Court they would be, but a couple of construction workers, one from Los Angeles, and the president of Bodinson Mfg. Co., Inc. [Tr. pp. 472-597.]

Moreover, the defendant had not been diligent and didn't even claim to have been diligent.

If that is the type of conduct by a litigant which is to be condoned, Section 282(4) of Title 35, U. S. C. is meaningless.

Plaintiffs were trapped by defendant's stratagems into continuing the trial, for the trial court clearly indicated he would not be a party to any delay. [Tr. p. 166.]

Plaintiff had to proceed to cross-examination of witnesses it had not seen, on drawings it had not time to study, and about subject matter carefully concealed from its counsel. Defendant skillfully had all three of its unnamed witnesses and its secret drawings appear on the last day of trial to insure plaintiff would not have even one evening to prepare and study the offered proofs.

**The Belated Grace Period Is Ineffective.**

Defendant, having artfully maneuvered his secret witnesses and proofs before the Court, planted the seeds which could not be stamped out. It does not require text books citations for the proposition that effective cross-examination cannot be carried out unless the cross-examiner is informed of the matter in question.

In patent cases, the prior use witnesses are not just mere witnesses testifying to an occurrence of which both parties are familiar. Prior use witnesses testify concerning events apart from any matter the patentee can be expected to know. To force any party to trial under such circumstances does not contribute to the ascertainment of truth.

It is indeed, for this reason that the Patent Laws, Section 282(4), provides for notice before trial, not for an interruption of trial. We agree with the Court that a primary function of the judicial system is to ascertain the truth, but we submit it cannot be ascertained in the manner approved thus far in this case.

The courts have consistently recognized that the notice requirement is no mere technicality whereas reliance on

a non-informing third party prior use is. (*Gillman v. Stern*, 114 F. 2d 28, 31 (C. A. 2, 1940).) Defendant in his 28 years in the business [Tr. p. 161] made no claim of learning anything from the "*Alabama Plant*." The requirement for notice has been strictly construed, regardless of the consequences to the party failing to give notice. (*The Philadelphia and Trenton Railroad Co. v. Stimpson*, 39 U. S. 448, 459.)

Nowhere has plaintiff been able to find that when rephrasing the statute to also require notice of state of the art defenses Congress changed its purpose. The rule exists to prevent the admission of unnoticed testimony. It is a *non sequitur* to say that the same rule has exceptions for "aiding the ascertainment of truth."

In the present case, the grace period after trial to bring in new evidence was an idle gesture. The witnesses had the chance to reconsider their testimony, to revise their stories before being recalled. That does not aid the ascertainment of truth.

**The Exception Contemplated Cannot Be  
Such as to Vitate the Rule.**

We do not contend that the last sentence of the section does not appear to provide for some exception. We do contend, however, that Congress never intended the exceptions to be so broad as to vitiate the very purpose of the rule.

Without the exception, the defendant would forever be barred from presenting the unnoticed proofs. The exception, at the least, must have been intended to place the patentee in no less favorable position than he would have been, if he had had the required notice. Plaintiff here obviously was not placed in such favorable position.

A rule, which for more than a hundred years has required 30 days notice before the trial, has now been judicially modified to a rule which only requires a 30 day investigation period after the trial. If Congress had intended this, certainly there would have been no point in keeping the rule.

**The Trial Court Failed to Specify Any Terms  
on Which Proof Could Be Made.**

In spite of the clear injunction of Section 282(4), Title 35, U. S. C. which states:

“In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires.”

here the proof without notice went into the record without any terms whatsoever having been specified by the trial court.

We submit that if this Court is to permit unbridled disregard of the requirement for notice, that, at least, it require the trial court to state the “terms” for admissibility prior to the “proof” being made. To that extent, plaintiff should be entitled to fair play.

**The Ruling of the Court Invites Disruption of  
Orderly Court Procedures.**

In its opinion, the Court recognizes that the purpose of the notice requirement is to prevent surprise at the trial, to enable both sides to better understand their adversary's case; and to cut down on “expensive delays,” or to prevent “a loss of a cause.”

The ruling of the Court is clearly opposed to those purposes. It has invited, and sanctioned, the two stage patent case. No longer can a party to a patent case



expect a speedy dispatch of the case. There are many doctrines which may affect the ascertainment of truth, but are salutary as necessary to orderly proceedings. Such doctrines as *res adjudicata*, and the stringent requirements for new trial are examples (our reply brief, pp. 11 and 12). For this Honorable Court to leave the questions up to the uncontrolled discretion of the trial court operates, as above stated, to induce defendants in patent actions to ignore the thirty-day notice rule. Stated otherwise, the instant case is a precedent that even though a defendant is not diligent, it is all right to bring in unnoticed testimony even after commencement of trial, which has the effect of removing the incentive for defendants to be anything other than dilatory.

We submit the Court reconsider its ruling on Section 282(4), Title 35, U. S. C. because it rewards disregard of the statute, encourages irregular and inefficient trial procedures and prejudices the diligent party.

### III.

#### Third Question.

**The Rule of This Court Under 28 U. S. C. 1732(a) Condones Admissibility of Documents Far Beyond the Provisions of the Statute and Accepted Doctrines.  
The Ruling of the Court.**

This Court has upheld the admissibility of certain drawings and shop orders [Deft. Exs. A and F-P] for the purpose of showing the construction details of apparatus purportedly made by the Bodinson Mfg. Co., Inc.

The Court's ruling means:

1. Documents are admissible to prove the existence and nature of an act or event which happened subsequent to the making of the documents.

2. Documents found in the files of a third party corporation are admissible upon proof of the regular business practices existing many years subsequent to the making of the documents.

**Drawings and Shop Orders Are Inadmissible to  
Prove the Existence and Natures of Apparatus  
Subsequently Sold and Used.**

The rule of admissibility of shop books, regularly kept business entries and records is premised on the inherent reliability and trustworthy character of such documents.

In the case at hand, experience and custom point to the unreliability of the documents here for the purpose offered. Common experience in industry clearly shows many differences between the draftsman's representation or design and the final product. This is particularly apparent here where the drawings and shop orders do not indicate what was sold and delivered. Indeed, they do not show anything listed on them was even made or completed.

Yet the drawings and shop orders are accepted by this Court to prove the physical existence and nature of a specific apparatus (Op. p. 11), in spite of the fact that Bodinson testified he had nothing to do with the Exhibits at the time they were purportedly made and that at no later date did he compare them with the Alabama Street plant. [Tr. pp. 579, 580.]

Even oral testimony of the maker of the drawings and shop orders would not be admissible to show a use of an apparatus, unless that person knew the apparatus

was made and how it was made. There is no such knowledge here.

Lacking any intrinsic reliability, or any testimony to authenticate them, we ask the Court to reconsider its holding that these documents are admissible to show the construction of the apparatus inside the "Alabama Plant."

**The Documents Are Inadmissible for Failure to Meet the Conditions of Section 1732(a).**

The Court's interpretation of the requirements of Section 1732(a) effectively opens the door to admissibility of documents which have none of the characteristics of reliability and trustworthiness, on which the statute is premised.

This record establishes the nature of entries made in the regular course of business of Bodinson Mfg. Co., Inc., only as early as 1940, some nine years subsequent to the dates appearing on the drawings. There was no showing of the regular business practice of either the company, or the general community in 1931, if even that would be sufficient.

The only proofs touching authenticity of these documents is that they were found in files of the corporation. Insufficiency of such proofs has been upheld by the First Circuit in *John Irving Shoe Co. v. Dugan*, 93 F. 2d 711 (1st Cir., 1937), for bills of materials; *United States v. Smart*, 87 F. 2d 3 (5th Cir., 1936), for medical reports; *National Labor Relations Board v. Sharples Chemicals*, 209 F. 2d 645, 653 (6th Cir., 1954).

In *Palmer v. Hoffman*, 318 U. S. 109, Mr. Justice Douglas, speaking for a unanimous court, referred to the report of the Senate Judiciary Committee on the bill which matured into Section 1732. That report identifies the intended enlargement of the old common-law rule to be enacted by the statutory provision:

“The old common-law rule requires that every book entry be identified by the person making it. This is exceedingly difficult, if not impossible, in the case of an institution employing a large bookkeeping staff, particularly when entries are made by machine.” (S. Rep. No. 1965, 74th Cong., 2d Sess., pp. 1, 2.)

Section 1732 was not intended to make admissible the entire contents of a company's files, on mere proof of a subsequent business practice, but only to relieve the offeror of the burden of bringing in the person who actually made the entry.

In support of the proposition that no proof of the regular business practice at the time the documents presumably made is required, the Court referred to *Korte v. New York, N. H. & H. R. Co.*, 191 F. 2d 86 (2nd Cir., 1951). In that case, the doctor's reports in question came not from some forgotten, unauthenticated source, but from the opposing party's own files. No one had any doubt as to the authenticity of the reports, that they had been received by defendant, stamped by its agent, concerned a particular individual, and recorded an existing act or occurrence. Not one of these facts is present in this case.

Even the decision in the *Korte* case is recognized as at variance with the stricter rulings by other Circuits. (*Gordon v. Robinson*, 210 F. 2d 192, 197, 198 (3rd Cir., 1954); *Baltimore & O. R. Co. v. O'Neill*, 211 F. 2d 190, 195 (6th Cir., 1954).)

The drawings and shop orders may be sufficient to show an intent to do something, but are not admissible by any conceivable theory to show that a particular act was subsequently done, or how it was done. On their face, they do not purport to be proof of such an act or event.

The statute, Section 1732(a), specifically spells out that the documents admissible under its terms are to be a "memorandum or record" of an act, occurrence or event. The documents here are not a "memorandum or record" of an act, occurrence or event material to this case. The question here is what was physically present on the inside of the "Alabama Plant," not what someone may have ordered to go into that plant.

The Court relies on the decision in *Kamm v. Rees*, 177 Fed. 14, 23 (9th Cir., 1910), to hold that the time at which a document is made may vary either before or after the occurrence of the act or event "recorded." In *Kamm v. Rees*, the drawings and ledger accounts were offered to show a series of acts where each document recorded a contemporaneous one of the acts, namely, to whom did plaintiff extend credit, over a period of time. We find no fault with that decision. It does not support the ruling in this case that a *prior document* can be a memorandum or record of a *subsequent event*.

We respectfully submit that the ruling on Section 1732 (a) is incorrect on the facts in this case, and will cause error in cases far beyond the field of patent law.

### Conclusion.

Rehearing and reconsideration of the questions presented should be granted because the rulings of law involved are erroneous on the facts here and set unsound precedents for future litigants.

Respectfully submitted,

WILLIAM DENNY,

RICHARD GAUSEWITZ,

*Attorneys for Plaintiff-Appellant.*

JARRETT ROSS CLARK,

*Of Counsel.*

### Certificate of Counsel.

I hereby certify that I am one of the counsel for the appellant and petitioner, and that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

RICHARD GAUSEWITZ.

No. 15250

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United States  
Court of Appeals  
for the Ninth Circuit

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THOMAS F. DORAN, ETHEL M. DORAN,  
ONEY S. RIGGS, DOROTHY F. RIGGS, IDA  
BEE MacDONALD, CLARA NIEMAN, GUS  
H. NIEMAN and JOHN W. MacDONALD,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Petitions to Review Decisions of The Tax Court of the  
United States

FILED

DEC 11 1956

PAUL P. O'BRIEN, CLERK





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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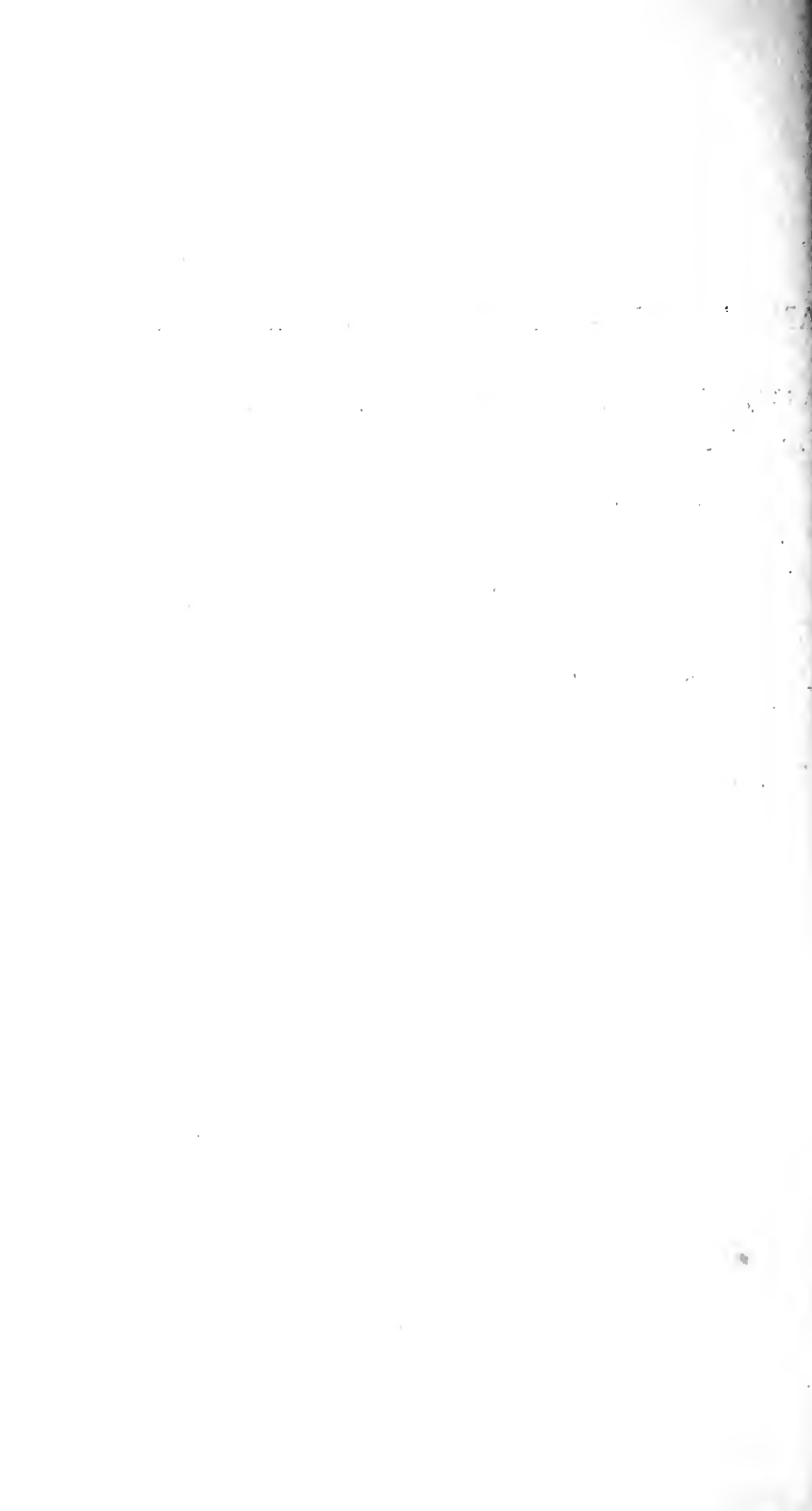
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## APPEARANCES

For Petitioner:

R. E. LOWE, Esq.

For Respondent:

GORDON N. CROMWELL, Esq.

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Docket No. 51871

THOMAS F. DORAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## DOCKET ENTRIES

1954

Feb. 1—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 2—Copy of petition served on General Counsel.

Feb. 1—Request for Circuit hearing in Spokane, Washington, filed by taxpayer. 2/4/54, granted.

Mar. 29—Answer to petition filed by General Counsel.

Mar. 31—Copy of answer served on taxpayer, Spokane.

1955

Mar. 10—Hearing set June 6, 1955, Spokane, Washington.

1955

- Jun. 6—Hearing had before Judge Withey on the merits, petitioner's motion to consolidate with dockets 51872, 51873, 51874, 51877 to 51880, inclusive, for hearing. Granted. Submitted on Stipulation of Facts. Motion to consolidate filed and served at hearing. Stipulation of Facts filed at hearing. Briefs due 8/5/55; replies due 9/6/55.
- Jun. 20—Transcript of Hearing 6/6/55 filed.
- Jul. 22—Motion for extension of thirty days to file brief filed by taxpayer. 7/25/55, granted to Sept. 6, 1955.
- Aug. 29—Brief filed by General Counsel. 9/8/55, copy served.
- Aug. 29—Joint motion for leave to file supplemental stipulation of facts, stipulation lodged, filed. 8/30/55, granted.
- Sep. 8—Brief filed by taxpayer. Copy served.
- Sep. 20—Motion for extension to Oct. 15, 1955, to file reply brief filed by taxpayer. 9/21/55, granted.
- Oct. 10—Reply brief filed by taxpayer. Copy served.

1956

- May 18—Memorandum findings of fact and opinion filed. Withey J. Decision will be entered for respondent. Served 5/22/56.
- May 18—Decision entered, Judge Withey, Div. 4. Served 5/22/56.



1956

Jul. 23—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

Jul. 23—Statement of Points filed by petitioner.

Jul. 26—Proof of service of petition for review and statement of points filed.

Aug. 2—Designation of Contents of Record on Review with proof of service thereon filed.

Aug. 2—Designation of additional portions of record on review with proof of service thereon filed.

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[Title of Tax Court and Cause No. 51871.]

## PETITION TO REDETERMINE DEFICIENCY

The above named Thomas F. Doran hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated November 10, 1953 (Bureau symbols AP:AA:90D:TRB:EEH), and as a basis for this proceeding alleges as follows:

1. The Notice of Deficiency was mailed to petitioner on November 10, 1953.

2. The petitioner is an individual with his residence at South 2824 Wall Street, Spokane, Washington. The return for the period involved was filed with the Collector of the District of Washington at Tacoma, Washington.

3. The amount of deficiency tax assessed is

\$884.56 and the deficiency is for income tax for the calendar year 1947. All of this amount is in controversy.

4. A copy of the Notice of Deficiency is attached hereto and marked Exhibit "A".

5. The determination of the tax set forth in said Notice of Deficiency is based upon the following errors:

(A) In determining that the petitioner realized income as his community one-half in the sum of \$884.56.

(B) In determining that any shares of Inland Motor Freight purchased by the Trustees under the Trust Agreement dated July 10, 1943, constituted income to the petitioner.

(C) In determining that the proceeds of the life insurance policy upon the life of Grover C. Ealy are taxable to the petitioner's income.

6. The facts upon which the petitioner relies in sustaining these assignments of error are as follows:

(a) Long prior to July 10, 1943, there existed between all of the stockholders of Inland Motor Freight an agreement by the terms of which, in substance, each shareholder agreed:

(1) That he would not sell his stock to any person without first offering the same to the other shareholders.

(2) That in case of the death of one of the shareholders, the surviving shareholders should have a right to purchase his stock in Inland Motor Freight.

(3) That under date of July 10, 1943, the various stockholders of Inland Motor Freight entered into an agreement to the effect that life insurance upon the lives of certain named persons should be procured by named trustees, to-wit, G. C. Ealy, Gus H. Nieman and O. S. Riggs, and that upon the death of either of the insured persons, the common stockholders should participate in the proceeds of said insurance, and

“said proceeds shall be distributed by said trustees to the then common stockholders as in this paragraph provided, said proceeds when distributed may be used by the then stockholders to purchase the common stock in the company held by the one so deceased at the time of his death.”

(4) That insurance was procured upon the life of G. C. Ealy by the three named trustees, as well as upon the other persons. Ealy passed away on March 19, 1947. The proceeds of the policy on his life were paid to the two surviving trustees and a successor trustee.

(5) Certain of the surviving stockholders purchased from the executor of the Grover C. Ealy Estate all of his shares in Inland Motor Freight. The proceeds of the insurance policy were used to apply on the purchase. These proceeds are taxed by the Commissioner pursuant to the 90-Day Letter.

Wherefore the petitioner prays that this court

may hear the proceeding and determine there is no deficiency due from the petitioner for the year 1947.

/s/ THOMAS F. DORAN,  
Petitioner

/s/ R. E. LOWE,  
Counsel for Petitioner

Of Counsel:

PAINE, LOWE, COFFIN, ENNIS &  
HERMAN,

Duly Verified.

### EXHIBIT "A"

Regional

123 U. S. Court House, Seattle 4, Washington

Ap:AA:90D:TRB:EEH

Nov. 10, 1953

Mr. Thomas F. Doran,  
S. 2824 Wall Street, Spokane, Washington

Dear Mr. Doran:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947, discloses a deficiency of \$884.56 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address,

Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Assistant Regional Commissioner, Appellate, 123 United States Court House, Seattle 4, Washington. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,

Commissioner of Internal Revenue

/s/ By James E. Westin,

Associate Chief, Appellate Division

Encl.: Statement, Form 1276, Agreement Form.

EEHarney:bc

Ap:AA:90D:TRB:EEH

## STATEMENT

Mr. Thomas F. Doran, S. 2824 Wall Street, Spokane, Washington.

Tax liability for the taxable year ended December 31, 1947.

Income Tax: Deficiency \$884.56.

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated July 30, 1952; to your protest dated November 18, 1952; and to the statements made at the conference held on August 17, 1953.

A copy of this letter and statement has been mailed to your representative, Mr. R. E. Lowe, 605 Spokane and Eastern Building, Spokane, Washington, in accordance with the authority contained in the power of attorney executed by you.

## Adjustments to Income

Adjusted gross income as disclosed by return,	
Form 1040 .....	\$4,200.00
Unallowable deductions and additional income:	
(a) Other income .....	3,758.11
Total.....	\$7,958.11
Nontaxable income and additional deductions:	
(b) Standard deduction .....	500.00
Net income adjusted .....	\$7,458.11

## Explanation of Adjustments

(a) It has been determined that you and your

wife, Ethel M. Doran, realized income of \$7,516.22 as the result of the purchase for your account of shares in Inland Motor Freight, a corporation, by Trustees under a Trust Agreement dated July 10, 1943. Since you reported no income from the above source, net income as reported on your return is increased by your community one-half of the above additional income of \$7,516.22, or \$3,758.11.

(b) The standard deduction of \$500.00 is allowed in the computation of your net income as adjusted herein.

### Computation of Income Tax

Net income adjusted .....	\$7,458.11
Less: Exemptions .....	1,000.00
<hr/>	
Normal tax and surtax net income.....	\$6,458.11
Tentative normal tax and surtax.....	\$1,497.43
Less: 5 per cent of tentative tax.....	74.87
<hr/>	
Income tax liability .....	\$1,422.56
Income tax liability disclosed by return,	
Original, Account No. 7278130 .....	538.00
<hr/>	
Deficiency in income tax .....	\$ 884.56

[Endorsed]: T.C.U.S. Filed February 1, 1954.

[Title of Tax Court and Cause No. 51871.]

### ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to

the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition except that it is denied that the amount of the deficiency determined for the calendar year 1947 was assessed.

4. Admits the allegations contained in paragraph 4 of the petition.

5. (A) to (C), inclusive. Denies that the Commissioner erred in his determination of the deficiency as shown by the notice of deficiency from which the petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraphs 5(A) to (C), inclusive, of the petition.

6. (a)(1) to (5), inclusive. Denies the allegations contained in paragraph 6(a) and in subparagraphs (1) to (5), inclusive, thereof.

7. Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's ap-



peal be denied and that the Commissioner's determination of deficiency be approved.

/s/ DANIEL A. TAYLOR, U.H.P.

Chief Counsel, Internal Revenue  
Service

Of Counsel:

Melvin L. Sears, Regional Counsel,  
Gordon N. Cromwell, Special Attorney,  
Internal Revenue Service

[Endorsed]: T.C.U.S. Filed March 29, 1954.

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The Tax Court of the United States

No. 51871, Thomas F. Doran; No. 51872, Ethel M. Doran; No. 51873, Oney S. Riggs; No. 51874, Dorothy F. Riggs; No. 51877, Ida Bee MacDonald; No. 51878, Clara Nieman; No. 51879, Gus H. Nieman; No. 51880, John W. MacDonald, Petitioners, vs. Commissioner of Internal Revenue, Respondent.

### MOTION TO CONSOLIDATE

Come Now the petitioners and move that the above-named proceedings be consolidated for hearing on the Tax Court calendar commencing at Spokane, Washington, on June 6, 1955.

/s/ R. E. LOWE,

Counsel for Petitioners

No objection:

/s/ JOHN POTTS BARNES,  
Chief Counsel, Internal Revenue  
Service,  
Counsel for Respondent

[Endorsed]: T.C.U.S. Granted June 6, 1955. G.  
G. Withey, Judge. Filed June 6, 1955.

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[Title of Tax Court and Causes.]

### STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by the respective attorneys of record, that the following facts are true, and that the same may be considered and accepted by the Court as offered in evidence by the parties in these proceedings; provided, however, that the stipulation shall be without prejudice to the right of any of the said parties to introduce other and further evidence.

1. Pursuant to petitioners' motion duly filed with the Court the above-named cases are consolidated for hearing.

2. The tax year involved in each case is 1947. Income tax deficiencies were determined by the respondent as follows:

	Deficiency - 1947
Thomas F. Doran	\$ 884.56
Ethel M. Doran	922.06
Oney S. Riggs	854.74

## Deficiency - 1947

Dorothy F. Riggs	854.74
Ida B. MacDonald	984.25
Clara Nieman	5,582.16
Gus H. Nieman	5,491.91
John W. MacDonald	984.25

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\$16,558.67

3. At all times material herein the following petitioners were and still are husband and wife; Thomas F. Doran (sometimes hereinafter referred to as T. F. Doran) and Ethel M. Doran; Oney S. Riggs (sometimes hereinafter referred to as O. S. Riggs) and Dorothy F. Riggs; John W. MacDonald and Ida B. MacDonald; Gus H. Nieman (sometimes hereinafter referred to as Gustav Heinrich Nieman) and Clara Nieman.

4. Each petitioner filed his or her separate individual income tax return for the taxable year 1947 with the Collector of Internal Revenue at Tacoma, Washington. Attached hereto and made a part of this stipulation as joint exhibits are the following copies of petitioners' income tax returns for the taxable year 1947:

Joint Exhibit 1-A—1947 return of Thomas F. Doran.

Joint Exhibit 2-B—1947 return of Ethel M. Doran.

Joint Exhibit 3-C—1947 return of Oney S. Riggs.

Joint Exhibit 4-D—1947 return of Dorothy F. Riggs.

Joint Exhibit 5-E—1947 return of Ida Bee MacDonald.

Joint Exhibit 6-F—1947 return of Clara Nieman.

Joint Exhibit 7-G—1947 return of Gus H. Nieman.

Joint Exhibit 8-H—1947 return of John W. MacDonald.

5. At all times material herein, Inland Motor Freight was a Washington corporation, with its principal office at Spokane, Washington, and was engaged in the business of a public carrier of freight and commodities under permits issued by the Interstate Commerce Commission and the regulatory bodies having charge of public carriers in the States of Washington, Oregon, Idaho and Montana.

6. During all of the year 1943 and for some time prior thereto, and thereafter until March 19, 1947, the petitioners Thomas F. Doran, Oney S. Riggs, Gus H. Nieman and John W. MacDonald, and one Grover C. Ealy (sometimes hereinafter referred to as G. C. Ealy) now deceased, and G. B. Halverson, were stockholders of Inland Motor Freight. At all times material herein, Gus H. Nieman, Oney S. Riggs, Thomas F. Doran, J. W. MacDonald, G. B. Halverson, and Grover C. Ealy, until his death on March 19, 1947, were actively engaged in the management and operation of Inland Motor Freight in various capacities and were members of the Board of Directors. In addition thereto, there were certain stockholders, to-wit: C. R. Webber and his wife, Esther L. Webber, Mae B. Edwards and Mary Lowry.

7. For some time prior to July 3, 1943 there has been informal discussions among the stockholders of Inland Motor Freight concerning some arrangement whereby funds could be accumulated so that, in case of the death of a stockholder, the survivors could purchase stock of the one deceased.

8. At a stockholders meeting on July 3, 1943, at which all stockholders were present, a certain resolution was adopted. The minutes of said meeting annexed and marked petitioners' Exhibit 9 are made a part of this stipulation.

9. On July 14, 1943 application was made by Inland Motor Freight a corporation to Sun Life Assurance Company of Canada, for the issuance of a policy upon the life of Grover C. Ealy in the sum of \$50,000, which application requested that the policy should be, by its terms, payable upon death to the Estate of Grover C. Ealy.

Similar applications were made for life insurance policies on the lives of the other officers and directors of the company.

10. The Sun Life Assurance Company of Canada declined to so issue the policies, but the Sun Life Assurance Company of Canada did issue policies on said applications providing the proceeds should be payable to Inland Motor Freight, a corporation, and, particularly, this was true of the policy issued on the life of Grover C. Ealy.

11. Said policies were sent to the agency of the Sun Life Assurance Company of Spokane and ten-

dered to Inland Motor Freight but the officers of Inland Motor Freight refused to accept said policies in this form.

12. On October 25, 1943, a special meeting of the Board of Directors was held, at which all were present, and Exhibit 10 attached hereto is a copy of the minutes of said meeting.

13. The document dated July 10, 1943 attached to Exhibit 10, was signed by all the stockholders, except Clifford Halverson and wife, a copy of which document entitled "Inland Motor Freight Stockholders Insurance Agreement" is attached hereto and marked Exhibit 11. Exhibit 11 was signed in November 1943.

14. Thereafter, application was made by "Grover C. Ealy, Gustav Heinrich Nieman and Oney S. Riggs, as trustees under Trust Agreement dated July 10, 1943" to Sun Life Assurance Company of Canada, for life insurance upon the life of Grover C. Ealy. This application was dated December 20, 1943 and a copy of the same is annexed to the policy attached hereto marked Exhibit 12. Similar applications were made for the other persons whose lives were to be insured under the agreement.

15. The Sun Life Assurance Company of Canada issued the policies, the proceeds of which are in question, and delivered the same to the three applicant trustees and beneficiaries. Thereafter in 1945 Grover C. Ealy purchased the stock of Inland Motor Freight owned by Mae B. Edwards and Mary Lowry.

16. Grover C. Ealy passed away on March 19, 1947 and upon his death, Gus H. Nieman, one of the petitioners herein, was elected president of the corporation. J. W. MacDonald and Thomas F. Doran were elected vice-presidents and became trustees under such trust agreement. These three, together with Oney S. Riggs, as such trustee, filed claim with Sun Life Assurance Company of Canada for the proceeds of the policy upon the life of Grover C. Ealy, and a check was delivered by Sun Life Assurance Company of Canada to the four trustees. Said check is Exhibit 13.

17. James A. Brown, as executor under the last will of Grover C. Ealy, entered into negotiations with the remaining stockholders executing Exhibit 11 for the purchase of stock belonging to the estate of Grover C. Ealy, deceased. These negotiations resulted in a contract for the sale by executor Brown to Gus H. Nieman, Thomas F. Doran, Oney S. Riggs, John W. MacDonald and G. B. Halverson, which contract was in writing and is annexed hereto and marked Exhibit 14. The certificates were assigned in blank by James A. Brown as executor and deposited with The Old National Bank of Spokane, in Spokane, Washington, to be delivered upon full payment of the purchase price. The initial payment referred to in said Exhibit 14 was the check which was delivered to James A. Brown, as executor, upon the contract being signed. As members of the marital community, consisting of the various petitioning husbands and wives, the communities are bound by

and receive the benefit of the contract annexed as Exhibit 14 and since in Washington income is split between the respective husband and wives, deficiencies are claimed by respondent against wives as well as husbands.

18. The initial premium payment upon the policy issued, covering the life of Grover C. Ealy was paid by said Inland Motor Freight directly to Sun Life Insurance Company of Canada, the insurer, and was charged by Inland Motor Freight against surplus, and premiums were similarly paid and charged thereafter every year until the death of Grover C. Ealy. In making income tax returns the company did not at any time deduct or claim deduction for the payment of said premiums.

19. The premiums upon the policy of insurance covering the life of Grover C. Ealy, paid by Inland Motor Freight, were not charged to Grover C. Ealy on the books of the company. At no time were such premiums reported by any shareholder as dividends.

20. The corporation did not at any time receive or claim dividends on the said insurance policies and did not at any time carry the said policies on its books as an asset either as to accrued dividends or cash surrender value and did not at any time receive any proceeds of the policy upon the life of Grover C. Ealy.

21. James A. Brown, the attorney who drafted Exhibits 9, 10, 11 and 14 died in March 1950.



22. All exhibits referred to in this stipulation are to be considered a part of the stipulated facts.

/s/ R. E. LOWE,

Counsel for Petitioners

/s/ JOHN POTTS BARNES,

Counsel for Respondent

[Endorsed]: T.C.U.S. June 6, 1955.

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[Title of Tax Court and Causes.]

### SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys of record, that the following paragraph numbered "20" may be considered and accepted by the Court as offered in evidence by the parties in these proceedings, in lieu of paragraph 20 of the Stipulation of Facts presented at the hearing of these proceedings before Judge Graydon G. Withey, in Spokane, Washington, on June 6, 1955:

20. The corporation did not at any time receive or claim dividends on the said insurance policies and did not at any time carry the said policies on its books as an asset either as to accrued dividends or cash surrender value.

/s/ R. E. LOWE,

Counsel for Petitioners

/s/ JOHN POTTS BARNES,  
Chief Counsel, Internal Revenue  
Service,  
Counsel for Respondent

EXHIBIT No. 9

“Special Meeting of the Stockholders of Inland Motor Freight was duly called and held in the office of the Company in Spokane, Washington on Saturday, July 3, 1943, at two o'clock P.M. Pursuant to said call all stockholders were present in person.

“The meeting was called to order by G. C. Ealy, he presiding—

“All stockholders were present and consented that at this special meeting the proposition of purchasing life insurance on certain stockholders from the Sun Life Insurance Company might be considered and the following plan was placed before the stockholders:

“That the Company would purchase and pay for insurance on six of its stockholders in the amounts set opposite their names, as follows:

G. C. Ealy	\$50,000.00
G. H. Nieman	35,000.00
Oney S. Riggs	10,000.00
J. W. MacDonald	10,000.00
T. F. Doran	10,000.00
G. B. Halverson	10,000.00

“It was regularly moved and seconded that a contract be worked out among the stockholders whereby this insurance should be purchased, the premiums to be paid by the company and upon the death of either of those insured, the face of the

policy on the one so deceased should be paid to the company and disbursed by the company to all of the stockholders as a special dividend and the proceeds received by said stockholders as a special dividend to be used by them to apply on the purchase of the stock in the Inland Motor Freight of the one so deceased.

“The motion was unanimously carried.

“There being no further business to come before the meeting, it was adjourned.

/s/ Grover C. Ealy, Chairman

Attest: /s/ Oney S. Riggs, Secretary

### EXHIBIT No. 10

Minutes of a Special Meeting of the Board of Directors of Inland Motor Freight a corporation

A special meeting of the directors of Inland Motor Freight, a corporation, was held at the office of the company at Spokane, Washington, on Monday, October 25, 1943, all directors being present namely: G. C. Ealy, Gus H. Nieman, O. S. Riggs, Thos. F. Doran, J. W. Macdonald, and G. B. Halverson, and each expressly waiving the time, place and manner of calling the meeting and consenting to the transaction of business, the meeting was called to order by Mr. Ealy, he presiding.

Mr. Ealy said the meeting had been called for the purpose of considering and in fact authorizing the parties entering into that certain contract dated the 10th day of July, 1943, wherein it was agreed by all of the stockholders of Inland Motor Freight that the

company should purchase life insurance on the following of its stockholders and in the amounts set opposite their name, to-wit:

G. C. Ealy	\$50,000.00
Gus H. Nieman	35,000.00
O. S. Riggs	10,000.00
J. W. Macdonald	10,000.00
Thomas F. Doran	10,000.00
G. B. Halverson	10,000.00

and that this company should pay the premiums thereon. The proceeds of said policies in the event of the death of either of the insured to be paid according to the terms of said contract. A copy of said contract being hereto attached and made a part hereof.

After some consideration and discussion, it was upon motion duly made, seconded and carried unanimously agreed that it would be for the best interest of the company for said stockholders to enter into said contract and for the company to purchase said insurance.

There being no further business to come before the meeting, it was adjourned.

G. C. Ealy, Director  
Gus Nieman, Director  
Oney S. Riggs, Director  
Thomas F. Doran, Director  
J. W. Macdonald, Director  
G. B. Halverson, Director

[Note: The balance of Exhibit 10 is the same as Exhibit 11 which follows.]

## EXHIBIT No. 11

Inland Motor Freight Stockholders Insurance  
Agreement

This Agreement made and entered into this 10th day of July, 1943, by and between G. C. Ealy and Agnes M. Ealy, his wife; Ella B. Goodrich, a widow; G. B. Halverson and Doris M. Halverson, his wife; Gus H. Nieman and Clara Nieman, his wife; J. W. Macdonald and Ida Bee Macdonald, his wife; Oney S. Riggs and Dorothy F. Riggs, his wife; T. F. Doran and Ethel M. Doran, his wife; C. R. Webber and Esther L. Webber, his wife; Mac B. Edwards, a widow; and Mary Lowry, dealing with her separate property, they being all of the common stockholders of Inland Motor Freight, a corporation, and

Whereas, pursuant to discussions had at a special meeting of the stockholders of Inland Motor Freight held July 3rd, 1943, at the office of the company in Spokane, Washington, at which meeting all common stockholders were present in person it is considered advisable and for the benefit of each common stockholder that life insurance be purchased on the lives of certain members of the present board of directors as herein contained, and,

Whereas, it is the intention that the Inland Motor Freight, a corporation, shall pay the premiums on said policies, and

Whereas, it is the intention that trustees shall be appointed for the purpose of making applications

for and obtaining said policies and that said trustees when selected and appointed as herein contained shall be named as beneficiary in each of said policies and upon the death of either of the insured, the proceeds of said policy on the life of the one so deceased shall be paid to said trustees and disbursed by them as herein contained.

It Is, Therefore, Hereby Mutually Agreed that the trustees for the purpose of carrying out this agreement, shall be composed of the President, Vice-President, Secretary and Treasurer of Inland Motor Freight, who are at present: G. C. Ealy, Gus H. Nieman, and O. S. Riggs, and upon either of the aforesaid persons ceasing to hold one of said offices, he shall immediately cease to be a trustee as herein defined and his successor in office shall automatically become a member of said trustees with all of the powers and authority vested in the present board.

Said trustees shall have authority to apply for and purchase the life insurance herein mentioned with themselves and their successors in office named as beneficiaries in said policies as trustees, etc., and upon the death of either of the insured shall collect the proceeds in the policy upon the life of the one so deceased, and shall distribute the same to the then common stockholders of record as follows:

Each common stockholder shall participate in the proceeds of the policy on the life of the one so deceased in the same ratio that his or her common

stock holdings in the Inland Motor Freight, a corporation, bears to the other common stockholders at the time of the death of the one so deceased, said proceeds shall be distributed by said trustees to the then common stockholders as in this paragraph provided, said proceeds when distributed may be used by the then stockholders to purchase the common stock in the company held by the one so deceased at the time of his death.

Said trustees shall have the right to surrender and cancel any policy when the person on whose life it is written is no longer a director or employee of Inland Motor Freight.

Should policies or either of them be surrendered and cancelled prior to the death of the insured, then the cash surrender value shall be paid to all of the common stockholders pro rata as herein contained.

Each stockholder and his wife, if married, agree that upon his or her death the common stock owned by said stockholder so deceased in the Inland Motor Freight, a corporation, shall be forthwith offered to the remaining stockholders in said company at its then fair value and said stockholders shall have a period of ninety days from the date of said offer in which to purchase the same at said price. By "fair value" is meant "book value", less any consideration for good will, certificates and permits from all regulatory bodies. If the remaining stockholders shall not purchase said stock within said ninety-day period at said price, the heirs and legal repre-

sentatives of the one so deceased shall be under no further obligation to said stockholders insofar as the sale of said stock is concerned.

The insurance referred to herein, which said trustees are authorized and directed to purchase is as follows, to-wit:

G. C. Ealy	\$50,000.00
Gus H. Nieman	35,000.00
O. S. Riggs	10,000.00
J. W. MacDonald	10,000.00
Thomas F. Doran	10,000.00
G. B. Halverson	10,000.00

It Is Further Agreed that said insurance shall be all purchased from the Sun Life Insurance Company of Canada.

This contract shall be binding upon the parties hereto and each of them, their heirs, executors, administrators and assigns and shall be and remain in full force and effect so long as said insurance policies, or either of them, are in effect.

In Witness Whereof we have hereunto set our hands this day and year first above written.

Grover C. Ealy  
 Agnes M. Ealy, his wife  
 May B. Edwards, a widow  
 Gus H. Nieman  
 Clara Nieman, his wife  
 G. B. Halverson  
 Doris M. Halverson, his wife



Oney S. Riggs  
Dorothy F. Riggs, his wife  
Thomas F. Doran  
Ethel M. Doran, his wife  
J. W. Macdonald  
Ida Bee Macdonald, his wife  
Ella B. Goodrich, a widow  
.....  
dealing with her separate  
property

It Is Expressly Agreed that Mary Lowry signs the aforesaid contract and agrees to every part of said contract, save and except that certain paragraph beginning at the last line at the bottom of page 2, and ending with the words "stock is concerned" being the twelfth line on page 3 of said contract. Mary Lowry does not consent to the conditions in said paragraph as mentioned and is not bound thereby.

Mary Lowry

EXHIBIT No. 12

Sun Life Assurance Company of Canada  
Head Office: Montreal

No. 1693662

Age 56 admitted rated at 59

Hereby Assures the Life of Grover C. Ealy (the assured) subject to the War and Aviation Provision contained herein in the sum of Fifty Thousand Dollars (the sum assured), which shall be payable at

the Company's office in the city of Spokane, Washington to Grover C. Ealy, Gustav Heinrich Nieman and Oney S. Riggs, (the owners) as Trustees under Trust Agreement dated the tenth day of July 1943 without obligation on the part of the Sun Life Assurance Company of Canada to see to the application of the proceeds of the policy, on receipt at its Head Office in Montreal of due proof of the death of the assured.

This policy is issued in consideration of the application therefor and of a premium of Three thousand four hundred and sixty-seven 50/100 Dollars to be paid to the Company on the fourteenth day of July 1943 and of the payment to it of a like amount yearly thereafter on the fourteenth day of July in every year during the lifetime of the assured.

This policy has been contracted for by the said Grover C. Ealy, Gustav Heinrich Nieman and Oney S. Riggs, as Trustees under Trust Agreement dated the tenth day of July 1943 (the owners).

All amounts payable or receivable hereunder shall be paid in lawful currency of the United States of America.

The Provisions and Privileges printed or written by the Company on the following pages form part of the contract and are binding on both parties thereto.

Signed and Sealed at Montreal, this seventeenth

day of November, one thousand nine hundred and forty-three.

[Seal]      /s/ Arthur B. Wood,  
                 President and Managing Director  
                 /s/ F. G. Cunningham, Secretary

Countersigned: [Illegible]

Whole Life Policy—Assurance Payable at Death—  
Annual Dividends. Premiums Payable for Life  
Unless Dividends Applied to Decrease Number  
of Premium Payments. War and Aviation Pro-  
vision.

\* \* \* \* \*



EX. 13

SUN LIFE ASSURANCE COMPANY OF CANADA

188

44043

Check No.

239501:

MONTREAL

11 24, 1947

50785.30

Fifty Thousand Seven Hundred Thirty-Five & 30/100 U.S. Dollars

10

Gustav Heinrich Niemann, J.V. MacDonald, S.Y.  
Doran and Oney S. Riggs as trustees under the  
agreement dated July 10, 1943.

## ORDER

POLICY NO. 1693662

Party no. 1693662

The Bank of California, National  
Association,  
San Francisco, Calif. 11/14/22

D. C. D. Bury.

Pay to the Order of James A. Brown,  
Executor under the Will of G. C.  
Ealy, deceased

ENDORSEMENT OF THIS CHECK ACKNOWLEDGES RECEIPT FROM THE SUN LIFE ASSURANCE COMPANY OF CANADA, OF THE WITHIN STATED AMOUNT, IN FULL SETTLEMENT OF THE ITEMS DETAILED ON THE STATEMENT DELIVERED HERewith WHICH STATEMENT HAS BEEN RETURNED BY THE PAYEE AND THE CORRECTNESS OF WHICH IS ACKNOWLEDGED.

[illegible]



## EXHIBIT No. 14

## Stock Sale Agreement

This Agreement made and entered into this 20th day of September, 1947, by and between James A. Brown, as executor under the Will of G. C. Ealy, deceased, party of the first part, hereinafter called the "Seller" and Gus H. Nieman, Thos. F. Doran, Oney S. Riggs, John W. Macdonald and G. B. Halverson, parties of the second part, hereinafter called the "Buyers", Witnesseth:

That the seller as executor under the will of G. C. Ealy, deceased, is the owner of 1598 shares of the capital stock of Inland Motor Freight, a corporation, organized under the laws of the State of Washington with its principal place of business at Spokane therein, together with 161½ shares of the capital stock of Inland Terminals, Inc., and 161½ shares of the capital stock of Inland Pacific Service, Inc.,

Now Then, It Is Agreed that the Seller will sell, and the Buyers will buy all of the aforesaid

1598 shares of the common stock of Inland Motor Freight, together with the 161½ shares of the common stock of Inland Terminals, Inc., and 161½ shares of the common stock of Inland Pacific Service, Inc.,

for the sum of Ninety Dollars (\$90.00) per share for the 1598 shares of the Inland Motor Freight stock, and without additional compensation for the Inland Terminals stock or Inland Pacific Service

stock. The value of the said Inland Terminals stock and the Inland Pacific Service stock is reflected and included in the aforesaid \$90.00 per share of Inland Motor Freight stock.

The total price for the aforesaid stock being the sum of One Hundred Forty-Three Thousand Eight Hundred Twenty and no/100 Dollars (\$143,820.00) payable as follows, to-wit:

Fifty Thousand Dollars (\$50,000.00) in cash upon the signing of this agreement, and upon receipt of the same, a copy of this agreement, together with all of the aforesaid stock shall be lodged in escrow with a Bank in the City of Spokane, Washington, all of said stock being duly endorsed; the balance of the purchase price, to-wit: \$93,820.00 to be paid as follows, to-wit:

\$10,000.00 or more on September 1st, 1948 and a like sum of \$10,000.00 or more on the 1st day of September each year until the full sum shall have paid with interest on deferred principal at the rate of three per cent (3%) per annum payable at the same time principal payments are made and in addition thereto.

It Is Agreed that the buyers may pay any additional sum on account of said purchase price at any time after January 2nd, 1948, and prior to its maturity.

This contract is subject to the approval of the Superior Court of Spokane County, Washington.

The escrow holder of this contract is directed to



pay the money to the seller as received and when the said contract is fully paid to deliver the stock to Buyers.

Time is the essence of this agreement, and if the Buyers fail or refuse to make the payments as herein contained, or should they fail or refuse to do anything herein made necessary for them to do and within the time therefor, then the seller may at his option cancel this contract, repossess said stock and retain all payments made hereunder, Provided that no forfeiture of this contract shall be made until after thirty days written notice shall have been given the Buyers by the Seller and the thing complained of not made good in the meantime.

Witness our hands this day and year first above written.

James A. Brown, as executor under the Will of G. C. Ealy, deceased, Seller''

Gus H. Nieman

G. B. Halverson

John W. Macdonald

Thomas F. Doran

Oney S. Riggs

[Endorsed]: T.C.U.S. Lodged Aug. 29, 1955. Filed Aug. 29, 30, 1955.

T. C. Memo. 1956-121

The Tax Court of the United States

Docket Nos. 51871-51874, 51877-51880

Thomas F. Doran, et al.,<sup>1</sup> Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Filed May 18, 1956

MEMORANDUM FINDINGS OF FACT AND  
OPINION

Roy E. Lowe, Esq., for the petitioners.

Gordon N. Cromwell, Esq., for the respondent.

Withey, Judge: The Commissioner has determined a deficiency in income tax of the petitioners for 1947 as follows:

Petitioner	Docket No.	Deficiency
Thomas F. Doran	51871	\$ 884.56
Ethel M. Doran	51872	922.06
Oney S. Riggs	51873	854.74
Dorothy F. Riggs	51874	854.74
Ida Bee MacDonald	51877	984.25
Clara Nieman	51878	5,582.16
Gus H. Nieman	51879	5,491.91
John W. MacDonald	51880	984.25

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<sup>1</sup> The proceedings of the following petitioners are consolidated herewith: Ethel M. Doran, Docket No. 51872; Oney S. Riggs, Docket No. 51873; Dorothy F. Riggs, Docket No. 51874; Ida Bee MacDonald, Docket No. 51877; Clara Nieman, Docket No. 51878; Gus H. Nieman, Docket No. 51879; and John W. MacDonald, Docket No. 51880.

The issue for decision is whether petitioners as stockholders of a corporation received taxable dividend distributions by the application on the purchase price of stock in that corporation for their accounts of the proceeds of a life insurance policy, the premiums upon which had been paid by the corporation.

### Findings of Fact

All the stipulated facts are found accordingly. These cases have been consolidated for trial and opinion.

At all times material herein the following petitioners were and still are husband and wife: Thomas F. Doran and Ethel M. Doran; Oney S. Riggs and Dorothy F. Riggs; John W. MacDonald and Ida Bee MacDonald; and Gus H. Nieman and Clara Nieman. Each petitioner filed his or her separate individual income tax return for 1947 with the collector of internal revenue at Tacoma, Washington.

Inland Motor Freight, hereinafter referred to as Inland, is a Washington corporation with its principal office in Spokane. During the year at issue it was a public carrier of freight and commodities for hire. All of the husband-petitioners herein and Grover C. Ealy had been since 1943, and continued to be in 1947, stockholders and actively engaged in the operations and management of Inland. Ealy died on March 19, 1947. All were members of the board of directors. Ealy was principal stockholder and president of Inland at his death. There were in addition four other stockholders not involved in this controversy.

Prior to July 3, 1943, informal discussion among Inland's stockholders began concerning the accumulation of a fund for the purchase of the stock of any deceased stockholder for the surviving stockholders. A special stockholders' meeting was held on that date at which it was formally resolved that Inland "purchase and pay for" insurance upon the lives of certain of its stockholders as follows:

G. C. Ealy	\$50,000
G. H. Nieman	35,000
Oney S. Riggs	10,000
J. W. MacDonald	10,000
T. F. Doran	10,000
G. B. Halverson	10,000

and

that a contract be worked out among the stockholders whereby this insurance should be purchased, the premiums to be paid by the company and upon the death of either of those insured, the face of the policy on the one so deceased should be paid to the company and disbursed by the company to all of the stockholders as a special dividend and the proceeds received by said stockholders as a special dividend to be used by them to apply on the purchase of the stock in the Inland Motor Freight of the one so deceased.

In pursuance of the resolution, Inland, on July 14, 1943, made application to a life insurance company for the issuance of an insurance policy upon the life of Ealy in the face amount of \$50,000, it being requested that Ealy's estate be the beneficiary.

Similar applications were also made with respect to the other stockholders in accordance with the referred to corporate resolution. The insurance company, refusing to issue the policies with proceeds payable to the estates of the respective assureds, issued in lieu thereof policies which were payable to Inland on the death of the insured. Inland's officers refused to accept such policies and, on October 25, 1943, a special meeting of the board of directors was held at which it was resolved that Inland "purchase said insurance" in the manner set forth in a contract entered into by and between the majority of the stockholders, dated July 10, 1943.

The contract of July 10, 1943, provided that the president, vice-president, and secretary and treasurer of Inland, who were G. C. Ealy, Gus H. Nie-man and O. S. Riggs, respectively, were authorized and directed as trustees to apply for and obtain the designated life insurance with themselves, as trustees, named the beneficiaries thereof, and with Inland to pay the premiums thereon; and that, upon the death of any insured, the proceeds of the policy insuring his life be collected by the trustees and distributed by them to the surviving stockholders of record at the time of such death in proportion to their stock ownership. It was further there provided that

said proceeds when distributed may be used by the then stockholders to purchase the common stock in the company held by the one so deceased at the time of his death.

Each of the signatories to the contract and their respective wives further agreed that upon the death of any of them the Inland common stock then owned by the deceased would be offered for sale at book value to the surviving stockholders for a period of 90 days.

On December 20, 1943, an application was made by the trustees for life insurance upon the lives and in the amounts above listed. In due course the policies were issued and delivered to the three trustee-beneficiaries. Upon the death of Ealy on March 19, 1947, petitioner, Gus Nieman, was elected president of Inland, petitioners, J. W. MacDonald and Thomas Doran, were elected vice-presidents, and the three with petitioner, Oney Riggs, then became the trustees under the terms of the July 10, 1943, agreement. As such, they received the proceeds of the policy of insurance upon the life of Ealy in the amount of \$50,785.30.

The executor of Ealy's estate entered into negotiation with the surviving signatories of the July 10 agreement for the sale and purchase of the Inland stock belonging to Ealy at his death. The negotiations resulted in a written agreement by the terms of which such stock was sold to Gus Nieman, Thomas Doran, Oney Riggs, John MacDonald and G. B. Halverson at a sale price of \$143,820. A down payment of \$50,000 was made to the seller by the trustees by endorsement to him of the check which represented the proceeds of Ealy's life insurance. In accordance with the sales agreement the stock

was forthwith deposited with an escrow agent to await completion of payment of the purchase price at which time the stock was to be delivered to the above-named purchasers. As members of the marital community consisting of the various petitioner-husbands and -wives, the communities were bound by and received the benefits of the stock purchase agreement, and, in accordance with the community property law of Washington, the respondent has determined deficiencies against the petitioner-wives as well as their husbands.

All premiums upon the policy of life insurance here involved covering the life of Ealy were paid by Inland directly to the issuing insurance company and were charged against surplus on Inland's books. No income tax deduction was at any time taken or claimed by Inland for the payment of such premiums. No charge to Ealy was made upon the corporation's books for such premium payments and none of Inland's shareholders have reported such premium payments as dividends. The corporation did not claim or receive dividends on any of the policies of insurance here involved and did not carry the policies as an asset upon its books, either as to accrued dividends or cash surrender value. The corporation at no time physically received the proceeds of the insurance upon the life of Ealy.

In making application for the policy of insurance upon the life of Ealy and in claiming, receiving and disbursing the proceeds thereof at Ealy's death, the trustees were acting for and in behalf of Inland.

## Opinion

Petitioners contend that Inland has never become the owner or possessor of the proceeds of the insurance on the life of its one-time president and principal stockholder, Grover C. Ealy, and that it, therefore, follows the corporation could not and did not distribute such proceeds to petitioners. Their contention is predicated upon the proposition that the stockholders, as individuals, have contracted with each other with respect to the application for such life insurance, the claim for the proceeds thereof, the receipt of the proceeds and the purchase of the deceased's Inland stock for the benefit of petitioners and that Inland was not a party to that contract. We are not impressed with their contention.

Careful consideration of the minutes of the stockholders' meeting of July 3, 1943, the application for insurance upon the life of Ealy, the minutes of the board of directors' meeting of October 25, 1943, and the stockholders' contract, wherein it was agreed such insurance should be obtained and, in case of the death of an insured, the disposition of the proceeds of such insurance, amply justify our finding of fact that the trustees, in applying for the insurance and in receiving and disbursing the proceeds thereof, were acting for and in behalf of Inland. They were its agents for those purposes and did not represent the stockholders as individuals.

It follows that Inland received the proceeds of



the Ealy policy which, although not representing income in its hands, *United States vs. Supplee-Biddle Hardware Co.*, 265 U.S. 189, did represent income to petitioners, its stockholders, when distributed to them through the purchase of stock for their benefit, *Isaac May*, 20 B.T.A. 282. The record does not disclose the earnings and profits of the corporation at the time of purchase of Ealy's Inland stock by the trustees, but such earnings are presumed to be adequate for that purpose under the provisions of section 115(b) of the Internal Revenue Code of 1939 in the absence of proof to the contrary.

Respondent has increased the taxable income of each petitioner by an amount which represents a proportion of the amount expended by the trustees for the purchase of Ealy's Inland stock which is in exact ratio to their stock interests in Inland. We hold he has properly done so.

Decisions will be entered for the respondent.

Served May 22, 1956. Entered May 22, 1956.

The Tax Court of the United States  
Washington

Docket No. 51871

THOMAS F. DORAN,                      Petitioner,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed May 18, 1956, it is

Ordered and Decided: That there is a deficiency in income tax in the amount of \$884.56 for 1947.

[Seal]            /s/ G. G. WITHEY,  
Judge

Entered May 18, 1956. Served May 22, 1956.

---

The Tax Court of the United States  
Washington

Docket No. 51872

ETHEL M. DORAN,                      Petitioner,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed May 18, 1956, it is



The Tax Court of the United States  
Washington

Docket No. 51874

DOROTHY F. RIGGS,                      Petitioner,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed May 18, 1956, it is

Ordered and Decided: That there is a deficiency in income tax in the amount of \$854.74 for 1947.

[Seal]            /s/ G. G. WITHEY,  
Judge

Entered May 18, 1956. Served May 22, 1956.

---

The Tax Court of the United States  
Washington

Docket No. 51877

IDA BEE MacDONALD,                      Petitioner,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the determination of the Court, as



The Tax Court of the United States  
Washington

Docket No. 51879

GUS H. NIEMAN,    Petitioner,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed May 18, 1956, it is

Ordered and Decided: That there is a deficiency in income tax in the amount of \$5,491.91 for 1947.

[Seal]                /s/ G. G. WITHEY,  
                                 Judge

Entered May 18, 1956. Served May 22, 1956.

The Tax Court of the United States  
Washington

Docket No. 51880

JOHN W. MacDONALD,                      Petitioner,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DECISION

Pursuant to the determination of the Court, as

set forth in its Memorandum Findings of Fact and Opinion, filed May 18, 1956, it is

**Ordered and Decided:** That there is a deficiency in income tax in the amount of \$984.25.

[Seal]                    /s/ G. G. WITHEY,  
                                      Judge

Entered May 18, 1956. Served May 22, 1956.

In the United States Court of Appeals  
for the Ninth Circuit

Tax Court Docket No. 51871

THOMAS F. DORAN,                      Petitioner,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

# PETITION FOR REVIEW

The taxpayer, the petitioner in this cause, by R. E. Lowe, counsel, hereby files his petition for a review by the United States Court of Appeals for the Ninth Circuit of a decision by the Tax Court of the United States rendered on May 18, 1956 (T. C. Memo 1956-121) determining deficiencies in the petitioner's Federal income tax for the calendar year 1947 in the amount of \$884.56, and respectfully shows:

1. That Petitioner taxpayer is a citizen and resident of the State of Washington, and that the

petitioner's income tax return for the year 1947 was filed with the Collector (now District Director) of Internal Revenue at Tacoma, Washington, which is located in the Ninth Circuit.

## 2. Nature of the Controversy.

The controversy involves the proper determination of the petitioner's liability for income taxes for the calendar year 1947. From the period 1943 through 1947, petitioner and G. C. Ealy, G. H. Nie-man, Oney S. Riggs, J. W. MacDonald, and G. B. Halverson were stockholders and members of the Board of Directors of Inland Motor Freight, hereinafter referred to as "Inland," a Washington corporation. Pursuant to a contract signed by taxpayer and other stockholders of Inland, and resolutions by the stockholders of Inland, trustees were appointed who applied for insurance on the lives of the officers and directors of the corporation. Under the terms of the agreement and resolutions, each stockholder and his wife agreed to offer his or her stock upon death of such stockholder to the remaining stockholders; and the insurance proceeds were to be available for use in purchasing the decedent's stock. Inland paid all premiums on the insurance policies.

In 1947 the president, G. C. Ealy, died and the insurance proceeds of \$50,000 taken on his life were paid to the trustees, who then, pursuant to an agreement between the remaining officers and directors of Inland and the executor of the estate of G. C. Ealy, paid the said \$50,000 to the estate of G. C.



Ealy as a down payment on the purchase of his stock for the benefit of the remaining officers and directors.

Petitioner did not report any part of the policies as income in the year 1947. Petitioner contends that his proportion of the proceeds of the insurance policy on the life of G. C. Ealy did not constitute income; that such proceeds were received by petitioner or by trustees for and on his behalf, and as proceeds of an insurance policy are exempt from income taxes. The Respondent, Commissioner of Internal Revenue, contends, and the Tax Court held, that the insurance policy and the proceeds thereof were the property of Inland Motor Freight and that such proceeds were distributed by the corporation to petitioner stockholders by the purchase of stock for petitioner's benefit.

3. The said taxpayer, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the tax court, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ R. E. LOWE,

Counsel for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed July 23, 1956.

[Title of U. S. Court of Appeals and Cause.]

## NOTICE OF FILING PETITION FOR REVIEW

To: John P. Barnes, Chief Counsel, Gordon N. Cromwell, Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the petitioner on the 23rd day of July, 1956, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and is served upon you.

Dated at Spokane, Washington, this 23rd day of July, 1956.

Respectfully submitted,

/s/ R. E. LOWE,  
Counsel for Petitioner

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed July 26, 1956.

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[Title of U. S. Court of Appeals and Cause.]

## STATEMENT OF POINTS

Now comes Thomas F. Doran, the petitioner herein, by his attorney, R. E. Lowe, and hereby asserts the following errors which he intends to

urge on review by the United States Court of Appeals for the Ninth Circuit from the decision of the Tax Court of the United States rendered in the above case on May 18, 1956.

1. The Tax Court erred in making the following finding:

“In making application for the policy of insurance upon the life of Ealy, and in claiming, receiving, disbursing the proceeds thereof at Ealy’s death, the Trustees were acting for and in behalf of Inland.”

2. The Tax Court erred in the portion of its opinion which reads as follows:

“It follows that Inland received the proceeds of the Ealy policy which, although not representing income in its hands (U. S. vs. Supplee-Biddle Hardware Co., 265 U.S. 189) did represent income to petitioners, its stockholders, when distributed to them through the purchase of stock for their benefit (Isaac May, 20 BTA 282).

3. The Tax Court erred in determining in its opinion the following:

“Respondent has increased the taxable income of each petitioner by an amount which represents a proportion of the amount expended by the trustees for the purchase of Ealy’s Inland stock, which is in exact ratio to their stock interests in Inland. We hold he has properly done so.”

4. The Tax Court erred in its opinion entered May 18, 1956, determining that:

“Decision will be entered for the respondent.”

5. The Tax Court erred in rendering its decision dated May 18, 1956, which ordered and decided that there is a deficiency in income tax in the amount of \$884.56 for 1947.

/s/ R. E. LOWE,  
Counsel for Petitioner

[Endorsed]: T.C.U.S. Filed July 23, 1956.

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The Tax Court of the United States

Docket Nos. 51871-51874, 51877-51880

[Title of Causes.]

### CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States do hereby certify that the foregoing documents, 1 to 70, inclusive, constitute and are all of the original papers and proceedings as called for by the "Designations of Contents of Record on Review" and "Designation for Additional Portions for Record on Review" including joint exhibits 1-A through 8-H, petitioners' exhibits 9 through 14, attached to stipulation of facts, on file in my office as the original and complete record in the proceedings before the Tax Court of the United States docketed at the above numbers and in which the petitioners in the Tax Court proceeding have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in

said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 14th day of August, 1956.

[Seal]            /s/ HOWARD P. LOCKE,  
Clerk, Tax Court of the United  
States

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[Endorsed]: No. 15250. United States Court of Appeals for the Ninth Circuit. Thomas F. Doran, Ethel M. Doran, Oney S. Riggs, Dorothy F. Riggs, Ida Bee MacDonald, Clara Nieman, Gus H. Nieman and John W. MacDonald, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed: August 27, 1956. Docketed: September 4, 1956.

                  /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15250

THOMAS F. DORAN, ETHEL M. DORAN,  
ONEY S. RIGGS, DOROTHY F. RIGGS, IDA  
BEE MacDONALD, CLARA NIEMAN, GUS  
H. NIEMAN, JOHN W. MacDONALD,

Petitioners, on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent, on Review.

PETITIONERS' STATEMENT OF POINTS  
AND DESIGNATION OF RECORD

Petitioners, by their attorneys, hereby designate under Rule 17 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, all items designated in Petitioners' Designation of Contents of Record on Review (Document Nos. 62-69, inclusive), together with Respondent's Designation for additional portions for the records on review (Document No. 70), with the exception of Item No. 1, Joint Exhibits 1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, and 8-H, which Item No. 1 Petitioner does not designate. Such designations appear in the typewritten Transcript of Record under document numbers set forth above.

Petitioners also adopt their respective Statements

of Points appearing in the typewritten Transcript of Record (Documents Nos. 54-61, inclusive).

/s/ R. E. LOWE,

/s/ ALAN P. O'KELLY,

Attorneys for Petitioners on  
Review

Certificate of Service attached.

[Endorsed]: Filed September 5, 1956. Paul P. O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

### MOTION TO CONSOLIDATE

Come now the petitioners and move that the above-named proceedings be consolidated for the purpose of printing the record, filing briefs, argument, and opinion, and respectfully show:

That the above cases were consolidated for hearing before the Tax Court of the United States;

That the Tax Court of the United States in TC Memo 56-121 issued a consolidated Memorandum of Findings of Fact and Opinion and then issued separate formal decisions in each case individually;

That each of the above cases involves an identical issue of law arising out of identical facts and circumstances.

Dated at Spokane, Washington, this 4th day of September, 1956.

Respectfully submitted,

/s/ R. E. LOWE,

/s/ ALAN P. O'KELLY,

Counsel for Petitioners

Certificate of Service attached.

[Endorsed]: Filed September 5, 1956. Paul P. O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

### STIPULATION

It is hereby stipulated by and between the parties hereto:

1. That each of the proceedings consolidated herein for the purpose of printing the record, filing briefs, argument, and opinion involves an identical issue of law arising out of identical facts and circumstances.

2. That the pleadings and petitions for review in each of the cases are identical in all material respects, with the exception of the amount of the tax involved which is not in dispute and not in issue.

3. That in printing the record the Clerk may print one set of pleadings, one opinion, and one petition for review, and that a similar set of pleadings was filed on behalf of all other named petitioners, and similar petitions for review were filed on behalf of all other named petitioners.



Dated this..... day of ....., 1956.

/s/ R. E. LOWE,

/s/ ALAN P. O'KELLY,

Attorneys for Petitioners

/s/ CHARLES K. RICE,

Assistant Attorney General,

Attorney for Respondent

[Endorsed]: Filed Oct. 3, 1956. Paul P. O'Brien,  
Clerk.



No. 15250

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IN THE  
**United States**  
**Court of Appeals**

FOR THE NINTH CIRCUIT

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THOMAS F. DORAN, ETHEL M. DORAN,  
ONEY S. RIGGS, DOROTHY F. RIGGS,  
IDA BEE MacDONALD, CLARA NIE-  
MAN, GUS H. NIEMAN, JOHN W.  
MacDONALD,

*Petitioners*

*vs.*

COMMISSIONER OF INTERNAL  
REVENUE,

*Respondent*

No. 15250

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BRIEF OF APPELLANT

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*On Appeal from the Tax Court of the United States*

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PAINE, LOWE, COFFIN AND HERMAN  
R. E. LOWE

ALAN P. O'KELLY

602 Spokane & Eastern Building  
Spokane 1, Washington

*Attorneys for Petitioners*



No. 15250

IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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THOMAS F. DORAN, ETHEL M. DORAN,  
ONEY S. RIGGS, DOROTHY F. RIGGS,  
IDA BEE MacDONALD, CLARA NIE-  
MAN, GUS H. NIEMAN, JOHN W.  
MacDONALD,

*Petitioners*

No. 15250

*vs.*

COMMISSIONER OF INTERNAL  
REVENUE,

*Respondent*

---

BRIEF OF APPELLANT

---

*On Appeal from the Tax Court of the United States*

---

PAINE, LOWE, COFFIN AND HERMAN  
R. E. LOWE  
ALAN P. O'KELLY  
602 Spokane & Eastern Building  
Spokane 1, Washington

*Attorneys for Petitioners*



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## JURISDICTION

The above actions involve identical issues of law arising out of identical facts and circumstances (R. 58) which were consolidated for hearing. The actions were brought in the Tax Court of the United States by means of petitions to redetermine deficiency, which deficiency was determined by the Commissioner of Internal Revenue. Notice of deficiency of each petitioner before the Tax Court was mailed to the respective petitioner on November 10, 1953 (R. 8). Said notices of deficiency determined a deficiency for each of the petitioners for the year 1947. No part of said deficiency has been paid.

On February 1, 1954, petitions were filed in each of the above cases with the Tax Court of the United States; and on February 2 copy of such petitions were served on the General Counsel for the Commissioner of Internal Revenue (R. 3, 5-11). Jurisdiction of the Tax Court to redetermine the deficiency determined by the Commissioner existed under Internal Revenue Code 1939, Sec. 272, as amended by Public Law 291, 79th Cong., Sec. 203, and 1942 Act Sec. 168 (a) 26 U. S. C. Sec. 272, now incorporated in the 1954 Internal Revenue Code, Sec. 6213, 6214 and 6215, Title 26, USC, Sec. 6213, 6214 and 6215, 68A Stat. 771, 772 and 773.

The decision of the Tax Court in each case was entered on May 18, 1956, determining the deficiency in income taxes to exist for the year 1947 as against each of the petitioners. (R. 44-49). A petition for review by the United States Court of Appeals for the Ninth Circuit was filed by

each petitioner with the Clerk of the Tax Court of the United States on July 23, 1956 (R. 49-51). The tax returns in respect of which the liability arises as to each of the petitioners were filed in Tacoma, Washington, within the Ninth Circuit (R. 15). Jurisdiction of the United States Court of Appeals for the Ninth Circuit exists under 1954 Int. Rev. Code, Sec. 7482 and 7483; 26 USC Sec. 7482 and 7483; 68A Stat. 890 and 891, and Rule 29 of the Rules of the United States Court of Appeals for the Ninth Circuit.

### STATEMENT OF THE CASE

All of the facts involved in this controversy are stipulated. The stipulation, together with the exhibits attached to the stipulation, constitute the record on the merits of this case (R. 14-35). The facts as stipulated may be summarized as follows:

Income tax deficiencies were determined by the Respondent against each of the petitioners for the year 1947 as follows:

Thomas F. Doran .....	\$ 884.56
Ethel M. Doran .....	922.06
Oney S. Riggs .....	854.74
Dorothy F. Riggs .....	854.74
Ida Bee MacDonald .....	984.25
Clara Nieman .....	5,582.16
Gus H. Nieman .....	5,491.91
John W. MacDonald .....	984.25
	\$16,558.67

Each of the petitioners having the same surname was husband and wife, and their income constituted community property. Each of the petitioners filed a separate income

tax return for the year 1947 with the Collector of Internal Revenue at Tacoma, Washington. The male members of each community were stockholders of and were actively engaged in the management and operation of Inland Motor Freight, a corporation. Grover C. Ealy was also a substantial stockholder and president of the corporation. There were a few other stockholders having a stock interest and at least one other person who was actively engaged in the management of the corporation who are not parties to this action.

Informal discussions were held by the stockholders of Inland Motor Freight concerning some arrangement whereby funds could be accumulated so that in case of the death of a stockholder the survivors could purchase stock of the one deceased. At a stockholders' meeting on July 3, 1943, at which all stockholders were present, a resolution was adopted by the stockholders of the corporation, a copy of which is attached to the stipulation of facts as Exhibit No. 9. (R. 22, 23)

On July 14, 1943, application was made by the corporation for life insurance upon the lives of Ealy and other officers and directors, to be payable upon death to the estate of the insured; but the company to which application was made declined to issue the policy in this form. The insurance company did, however, issue policies with Inland Motor Freight, a corporation, as beneficiary, with the proceeds payable to it. The officers of the company refused to accept the policy in this form. (R. 17-18)

The stockholders as individuals entered into an agreement dated July 10, 1943, a copy of which is attached to the stipulation as Exhibit No. 11 (R. 25-29). The signatures were not completed until November 1, 1943. Halverson and his wife, who were stockholders, did not sign the agreement. This agreement, after various recitals, appointed certain persons as trustees for the purpose of the agreement. It authorized the trustees to apply for and purchase life insurance naming themselves and their successor as beneficiaries; authorizing them to collect the proceeds; directed that each stockholder should participate in the proceeds in case of death in the same ratio as his stock; and "said proceeds when distributed may be used by the then stockholder to purchase the common stock in the company held by the one so deceased at the time of his death." (R. 27). Each stockholder and his wife also agreed with each other that upon his death his stock should be offered to the remaining stockholders at fair value, and the survivors would have 90 days within which to complete the purchase.

On October 25, 1943, a Directors' meeting was held. The minutes of this meeting recite that it was called for the purpose of considering and authorizing the parties to enter into the contract dated July 10, 1943 and "It was upon motion duly made, seconded, and carried and unanimously agreed that it would be for the best interest of the company for said stockholders to enter into said contract, and for the company to purchase said insurance." (R. 23, 24)

Application was then made by the trustees appointed by the trust agreement for life insurance upon the life of Grover C. Ealy and other stockholders and directors, with

themselves as beneficiaries. The policy was issued and dated as of November 19, 1943 (R. 29-31). The policy listed the trustees as owners and beneficiaries in their capacity as trustees under the trust agreement dated July 10, 1943 (R. 30).

Grover C. Ealy passed away March 9, 1947, and the named trustees and successor trustees claimed and received a check for the proceeds of the policy. (R. 32)

These petitioners and another stockholder then entered into a contract with Ealy's executor to purchase the stock belonging to his estate. The insurance check was used to make the initial payment. The certificates were signed by the executor and placed in the bank, to be delivered upon payment of the purchase price over a ten-year period. (R. 19)

The insurance premiums on this and the other policies were paid by the company and charged against surplus. No deduction for these payments was made in making income tax returns. (R. 20)

The premiums so paid were not charged to Grover C. Ealy or the other individuals and were not reported by Ealy and the other individuals as dividends. (R. 20)

The corporation at no time received dividends or income from the policies and did not carry the policies on its books in any way as an asset. (R. 21)

The Commissioner of Internal Revenue assessed a deficiency against each of the petitioners on the grounds that

the proceeds of the insurance policy on the life of Grover C. Ealy was income to the petitioners in the year 1947. If the proceeds of the policy constituted income to the petitioners which is not exempt as being proceeds of an insurance policy, the amount of tax assessed has been correctly computed.

## SPECIFICATION OF ERRORS

- I. The Tax Court erred in making the following finding:  
“In making the application for the policy of insurance upon the life of Ealy and in claiming, receiving, and disbursing the proceeds thereof at Ealy’s death, the trustees were acting for and in behalf of Inland.”
- II. The Tax Court erred in failing to find that in making application for the policy of insurance upon the life of Ealy and in claiming, receiving, and disbursing the proceeds thereof at Ealy’s death, the trustees were acting for and in behalf of the stockholders pursuant to the agreement dated July 10, 1943.
- III. The Tax Court erred in its opinion that  
“Careful consideration of the minutes of the stockholders meeting of July 3, 1943, the application for insurance upon the life of Ealy, the minutes of the Board of Directors meeting of October 25, 1943, and the stockholders’ contract wherein it was agreed that such insurance should be obtained and in case of the death of the insured the disposition of the proceeds of such insurance amply justify our finding of fact that the trustees in applying for the insurance and in receiving and disbursing the proceeds thereof, were acting for and in behalf of Inland. They were its agents for those purposes and did not represent the stockholders as individuals.”



IV. The Tax Court erred in the portion of its opinion which reads as follows:

“It follows that Inland received the proceeds of the Ealy policy, which although not representing income in its hands (*U. S. v. Supplee-Biddle Hardware Co.*, 265 US 189,) did represent income to petitioners, its stockholders, when distributed to them through the purchase of stock for their benefit (*Isaac May*, 20 BTA 282).”

V. The Tax Court erred in determining in its opinion the following:

“Respondent has increased the taxable income of each petitioner by an amount which represents a proportion of the amount expended by the trustees for the purchase of Ealy’s Inland stock, which is in exact ratio to the stock interests of Inland; we hold he has properly done so.”

VI. The tax Court erred in its opinion entered May 18, 1956, determining that:

“Decision will be entered for the respondent.”

VII. The Tax Court erred in rendering its decision dated May 18, 1956, which ordered and decided that there is a deficiency in income tax for each of the petitioners for the year 1947.

## SUMMARY OF ARGUMENT

This case involves a single fundamental question of law. Under the facts of this case, were the trustees acting on behalf of the corporation so that their distribution of the proceeds of the insurance policy constituted a taxable dividend, or were they acting on behalf of the individual stock-

holders so that the proceeds were exempt as being proceeds of an insurance policy paid directly to the trustees acting as agents for the stockholders.

The Tax Court, in determining that the trustees were acting on behalf of the corporation and that the distribution to the trustees was a distribution to the corporation, appeared to rely primarily on the wording of the resolution of July 3 and overlooked the real substance and nature of the transaction. It overlooked the fact that this purchase of insurance was not for a corporate purpose, but was entirely for the benefit of stockholders; it overlooked the fact that the trustees who were the owners of and entitled to the proceeds of the policy, were named and appointed by the agreement among the stockholders and not by action of the corporation; it overlooked the fact that under the agreement appointing the trustees, the corporation had no control or authority or other indicia of ownership, and finally it overlooked the fact that the payment of premiums by the corporation was in fact a distribution of income to or for the benefit of the stockholders, was income to the stockholders and therefore the stockholders in fact paid all premiums.

It is inconsistent to hold that where the corporation purchases something which is solely for the benefit of the stockholders, the money paid out by the corporation for such purchase constitutes a taxable dividend, and yet, at the same time, to hold that the thing that was purchased with the money, which the courts hold to be constructively the stockholders' money, becomes the property of the corporation, so that when it comes into the hands of the stock-

holders they are considered to have again received as a dividend what they have already paid for. The holding in this case that the insurance proceeds were taxable to the stockholders would thus be inconsistent both with reason and with the established case law holding that payment of money by a corporation for the benefit of its stockholders constitutes taxable dividends.

## ARGUMENT

I. The stockholders' contract is not a corporate act.

The stockholders' contract dated July 10, 1943, does not even purport to be an act of the corporation. It is purely an agreement between the persons or stockholders of the corporation, the essence of which is that:

a. Each agrees that in the case of his death the surviving stockholders shall have a prior right to purchase his stock.

b. Trustees are appointed for the purpose of procuring insurance on the lives of certain of the officers to provide funds with which these particular stockholders may purchase such stock.

It is well established that stockholders as such can act only at a corporate meeting which is intended to be a meeting and is called as such; and any other form of action by them is void so far as it may be claimed to be a beneficial act.

“The corporation is a body of individuals united as a single separate entity. Therefore, the corporate powers, when vested in the stockholders or members, are

vested in them collectively, as a body, and not as individuals. They have no power to act as or for the corporation except at a corporate meeting called and conducted according to law. Action by the stockholders or members individually, and not at a corporate meeting, even though a majority may concur and even though their consent be expressed in a writing, signed by them, is not the action of the corporation and is void."

5 *Fletcher's Cyc. Corp. Sec.* 1996, pg 4

For a concrete example, see

*Barnett v. Mayer & Bros.*, 119 Wash. 323, 205 P. 396.

We assume that if there had been nothing more than a contract among the stockholders and they had paid the premiums themselves, there clearly would be no tax due.

What facts operated in this case to change this result in the opinion of the Tax Court? It is not possible precisely to determine this question from the Tax Court's opinion. Of course it is quite obvious from the events that transpired and the reading of the resolutions and agreement among the stockholders that the parties to this agreement and the officers and directors of the corporation had no clear concept of what they were attempting to do and it is true that the resolutions refer to the company purchasing the insurance, which appears to be the language that influenced the Tax Court in rendering its decision.

What actually happened, however, was completely inconsistent with the wording of these resolutions. First, the trustees were appointed pursuant to the terms of the agreement among the stockholders rather than by the corporation acting either through its officers, directors, or stockholders. Secondly, when the insurance company issued the

policies in the name of the company, the parties refused to accept them. After some months of negotiation, the policies were finally issued pursuant to an application made by the trustees, with the trustees as the named beneficiaries to receive the proceeds of the policies and to use them for a very specific purpose which could benefit only the stockholders and not the corporation. The corporation had no interest in the proceeds of the policy.

The resolution of July 3 (Exhibit 9) (R. 22, 23) contemplated that the company would purchase the policies, that the proceeds of the policy would be paid to the company and disbursed by the company to all the stockholders as a special dividend. Such an arrangement would be defective from several standpoints, as well as from the standpoint of its tax consequences. For one thing, the corporation cannot bind itself to pay out a special dividend in the future. Under Washington law, RCW Sec. 23.24.030, dividends may only be paid out of surplus, so that a declaration of dividend would depend upon the financial condition of the company at the time. RCW 23.24.030 provides:

*“Declaration of Dividends:* No corporation shall pay dividends: (1) In cash or property except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter the amount of its capital stock after deducting from such aggregate of its assets the amount by which such aggregate was increased by unrealized appreciation in value or revaluation of fixed assets; (2) in shares of the corporation, except from the surplus of the aggregate of its assets over the aggregate of its liabilities, including in the latter the amount of its capital stock.”

It would also seem clear that while the corporation could take out insurance on the life of one of its officers for the benefit of the corporation, it would be clearly improper for the corporation to take out insurance on the life of one of its officers purely for the benefit of the other officers and stockholders of the company. It has even been held that a consent to a change of beneficiary under such circumstances is *ultra vires*. See *Wolter v. Johnston*, 34 F. 2d 598; 68 ALR 1211.

But regardless of the reason, the fact that the plans were changed before they were consummated is irrefutably proved by the fact that the insurance was not taken out by the corporation but instead was taken out by the trustees appointed by the stockholders under the terms of their contract dated July 10.

The basic problem is, who owned the insurance policy. Of course, the concept of ownership is sometimes rather difficult. General definitions can be found in 42 Am. Jur. 187, 217 (Property Section 2 and 40); also 73 CJS 135-149, 181 (Property Section 1 (b), Section 13). In *Texas Co. et al vs. Hauptman*, 91 F. 2d 449, the Circuit Court of Appeals for the Ninth Circuit said at Page 451:

“What is property? It is ‘the sum of all the rights and powers incident to ownership.’” (Citing cases) “In 22 RCL 37, Sec. 2, it is said:”

“The term ‘property’ has a most extensive signification, and in its strict legal sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects. But the word is often used to indicate the subject of the property or the thing owned, as a chattel

or a tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations, of invisible rights, the evidence of things not seen. Much of the uncertainty and confusion observable in the decisions have arisen from overlooking this distinction; and such is the uncertainty of language that it is necessary to consider the context in order to determine the sense in which a particular word is employed, if it can ever be employed in more than one . . .”

“Following this in Section 3 it is said:”

“‘Property, is a determinate object as heretofore defined is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of that object . . .’”

Who was it, then, that was the owner of this policy and specifically the owner of the proceeds of the policy which became due upon the death of Mr. Ealy? Who had the right of use, enjoyment, and disposal of that money? Could the corporation have demanded that money to be put to a general corporate use? Could the corporation have any power to change the contract of insurance prior to Mr. Ealy's death? Who had the use, enjoyment, and disposal of this insurance or its proceeds? It seems to us that the answer is quite obvious. The trustees were named and appointed pursuant to a contract among the stockholders. If any change were to have been made in the insurance contract or any part of this transaction, with the exception of the arrangement for paying the premiums, clearly the stockholders would have had to make this change as parties to the contract. The corporation, of course, could have discontinued paying the premiums at any time. As a matter of fact, if it had not had the surplus available to pay

the premiums, it would have been forced to discontinue the premiums under the Washington state corporation law, since the payment of these premiums clearly constituted the paying of a dividend. But the stockholders having all indicia of ownership and having full and complete control over the insurance policies and the proceeds of these insurance policies clearly were the ones who received the proceeds of the policies rather than the corporation.

In *Mickelberry's Food Products Co., et al vs. Haeusserman, et al*, Mo. Sup., 247 SW 2d 731, the Missouri court dealt with a similar situation. In that case there was a trust set up for the benefit of the stockholders, the premiums to be paid out of dividends or surplus. The specific case involved an interpretation of the agreement as to whether ownership of the insurance followed ownership of the stock. It is significant that no question was ever raised and no one considered that there apparently was any question as to whether or not the corporation owned the insurance. We likewise feel certain that had the question of the interpretation of the agreement concerned herein been raised in any other manner, it would not have occurred to anyone that the corporation owned the insurance or was entitled to the proceeds of the insurance.

We assume it will be argued that the corporation, however, paid the premiums and because it paid the premiums somehow it should be the owner of and entitled to the proceeds of the insurance. This would seem to be a non sequitur on its face.

It has been held that the fact that shareholders purchased property with the funds of a corporation did not necessitate



a holding that the profits from a sale of such property were an income to the corporation. See *Commissioner v. McCloskey* (CCA 5), 76 F. 2d 373; *Telfair Stockton*, 26 BTA 801.

The argument, however, loses all validity when it is considered that the law has been well established that the purchase by a corporation of something which is purely or even primarily for the benefit of the stockholders constitutes a distribution to the stockholders. There are many diverse situations where this has been held to be true. See *Redhead vs. Iowa National Bank*, 127 Iowa 572, 103 NW 796, where it was held that a resolution providing for a payment by the bank for taxes on bank stock constituted a declaration of dividend equal to the taxes levied on each share where the bank was not obligated to pay the tax. Also see *William E. Freeman*, 4 TC 582, where it was held that the purchase of an annuity contract by an employer for an employee constituted income to the employee; *Chandler v. Commissioner*, (CCA 3), 119 F. 2d 623; *Dean v. Commissioner* (CCA 3), 187 F. 2d 1019; *Sam E. Wilson, Jr.*, CCA 5, 219 F. 2d 126, forgiveness of a debt by a corporation; *Earle F. Tucker*, 23 TC 115, Dec. 20, 627; *E. Lasker*, 11 TCM 50, Dec. 18, 749 (M); *Beer vs. U. S.*, 132 F. Supp. 282, and many others. But the case most closely in point is *Paramount-Richards Theaters, Inc., et al vs. Commissioner of Internal Revenue*, CCA 5, 153 F. 2d 602. In that case a corporation and an individual were equal owners of legal title to all stock of another corporation. They entered into an agreement whereby they caused the corporation to pay premiums on insurance on the life of the individual stockholder, the proceeds of which insurance were to be used to adjust the purchase price of stock

between the stockholders in the event certain options to purchase were exercised. It was held that the payment of these premiums constituted the declaration of a dividend; they were not deductible as a business expense by the corporation, and the amount of the premiums constituted income to the individual stockholders. The court said:

“Corporate earnings may constitute a dividend notwithstanding that the formalities of a dividend declaration are not observed; that the distribution is not recorded on the corporate books as such; that it is not in proportion to stockholdings, or even that some of the stockholders do not participate in its benefits.”

So, in a case such as this, where the courts have treated and clearly should treat the payment of premiums as corporate distribution, there should be no question but that the insurance purchased with these funds which constituted a corporate distribution to the stockholders should belong to the stockholders, particularly where trustees appointed by the stockholders hold legal title to the insurance.

It might be contended that this case is similar to *Golden v. Commissioner*, 113 F. 2d 590, in which case the corporation, after becoming the owner and beneficiary of a policy upon which it paid dividends, attempted to and did assign all of its interest under the policy to a trustee to pay the proceeds to certain stockholders. While we feel that the dissenting opinion in that case is the more persuasive opinion, this case can be differentiated as readily as the court distinguished the situation in *Cumberland Public Service Co. v. U. S.*, 338 U. S. 451, 94 L. ed. 251, 70 S. Ct. 280, from the Court Holding Company Case, *Commissioner v. Court Holding Co.*, 324 U. S. 331, 89 L. ed. 981, 65 S. Ct. 707. The

distinctions are rather fine in each case, but as in those cases, the incidence of taxation should depend upon the substance of the transaction regardless of "mere formalisms." In the instant case, the corporation never at any time became the owner of the policies; the trustees as trustees for the stockholders applied for and were the initial and only owners and beneficiaries of the policies. Also, in the *Golden* case the court pointed out that the corporation reserved some rights which the court stated constituted a retention of incidence of ownership sufficient to delay the occurrence of a transfer, and even under the majority opinion it would appear to us that a different result would obtain in the instant case where the corporation at no time had any of the incidence of ownership. The case of *Isaac May*, 20 BTA 282, cited by the tax court is even more clearly distinguishable since the insurance contract named the corporation as the sole beneficiary.

It was stipulated that none of the present petitioners paid taxes on their pro rata share of the premiums paid on this or any other policies of insurance. However, this factor is completely irrelevant. There is no contention of any fraud or deliberate or willful wrongdoing in this case, and no reason is shown as to why the Commissioner could not have assessed the proper taxes. Of course, if the taxes had been properly assessed, the taxpayers would have been assessed on an entirely different basis. Mr. Ealy, for instance, would have been one of the principal persons assessed. As stated in *Mertens Law of Federal Income Taxation*, Vol. II, Chap. 17, pp. 2, 3, Sec. 1701:

"The Government can, however, only tax the right taxpayer; there can be no scapegoat for the real taxpayer who may have escaped tax."

*Swartz, Inc. v. Commissioner*, 69 F. 2d 633,

*U. S. v. S. F. Scott & Sons, Inc.*, 69 F. 2d 728.

If the insurance was the property of the stockholders, and the proceeds of the policy were payable to the stockholders or to the trustees as agents for the stockholders, the proceeds are exempt under Sec. 22 (b) (1) of the 1939 Internal Revenue Code, which provides as follows:

“Sec. 22: Gross Income.

(a) General Definition . . .

(b) Exclusions from Gross Income. The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(1) Life insurance. Amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or otherwise (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income);”

This exemption applies to amounts received without reference to the character of the recipient. *United States v. Supplee-Biddle Hardware Co.*, 265 U.S. 189, 68 L. ed. 970. It had been held to apply even in the case where a creditor insured the life of his debtor. *Durr Drug Co. v. U. S.*, 99 F. 2d 757. The fact that the proceeds were handled by trustees rather than by the stockholders directly would not seem to be material. The Commissioner's regulations applicable to the taxpayer involved, Regulations 111, Sec. 29.22 (b) (1) -1) provided in part:

“The proceeds of life insurance policies, paid by reason of the death of an insured to his estate or to a beneficiary (individual, partnership, or corporation), directly *or in trust*, are excluded from the gross income of the beneficiary, except in the case of certain transferees as provided in Sec. 29.22 (b) (2) - 3 and in the case of a spouse to whom such payments are income under Sec. 22(k) . . .” (Italics ours).

The same wording has been carried over into the present regulations. (26 CFR Sec. 39.22 (b) (1) - 1).

## CONCLUSION

It is respectfully submitted that the proceeds of the insurance policy on the life of Mr. Ealy were clearly payable and paid to trustees on behalf of the stockholders for petitioners herein. The Tax Court's conclusion that the proceeds were payable to the corporation and were distributed by the corporation as a special dividend is wholly inconsistent with the stipulation of facts and the exhibits attached thereto.

The insurance in question was taken out by trustees appointed by the stockholders pursuant to the agreement dated July 10. The stockholders, petitioners herein, had control of and were the owners of both the insurance policy and the proceeds payable under the terms of the policy. While the corporation paid the premiums out of its funds, these funds in fact were the funds of the stockholders which should be charged constructively to them as dividends. It is illogical and inconsistent for the courts to reverse the whole theory upon which they have reached the conclusion of the taxability of the premiums to the stockholders solely for the purpose of finding in every case possible that the

taxes are payable. The tax laws are sufficiently confusing, not only to the ordinary person, but even to attorneys and accountants working with the tax laws, without now introducing a complete inconsistency which makes the incidence of taxation depend on how the Government can collect the greatest amount of taxes.

*Respectfully submitted,*

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No. 15250

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IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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THOMAS F. DORAN, ETHEL M. DORAN,  
ONEY S. RIGGS, DOROTHY F. RIGGS,  
IDA BEE MacDONALD, CLARA NIE-  
MAN, GUS H. NIEMAN, JOHN W.  
MacDONALD, *Petitioners*

No. 15250

*vs.*

COMMISSIONER OF INTERNAL  
REVENUE, *Respondent*

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REPLY BRIEF OF APPELLANTS (PETITIONERS)

---

*On Appeal from the Tax Court of the United States*

---

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The briefs filed in this case draw the issue very sharply. The facts were stipulated and the issues are pure issues of law—corporation law and trust law. Since there is no question of fact involved—only issues of law—the decision of the Tax Court is not controlling.

*Owen vs. Commissioner* (CA - 9) 53 F. 2nd 329

It must be conceded that there was a corporation distribution in connection with the transaction involved in this case. If the distribution was made when the insurance policies were taken out and the premiums paid, then, as respondent inferentially concedes, the decision of the Tax Court should be reversed since there could not be two distributions of the same property. If there was no distribution until the policies matured and were used for the purpose of funding the stockholders' buy-sell agreement, then the decision of the Tax Court should be affirmed. The issue turns on who were the beneficiaries of the trust set up by the stockholders' agreement of July 10, 1943.

It was somewhat surprising to find Respondent taking the position that there was no distribution of corporate assets when the corporation paid the premiums on the insurance policies. (Br. 11, 17) Respondent does not even mention the case of *Paramount-Richards Theaters, Inc., et al vs. Commissioner* (CA 5) 153 F. 2d 602. It is difficult to believe that had not fate intervened to mature one of these policies, and had the tax authorities audited the books of this corporation before any of the parties died, that a deficiency would not have been assessed against each of the individuals who were parties to the agreement of July 10,

1943, based on the amount of premiums paid on these policies.

Respondent agrees in principal that the substance, not the form, of the transaction should control. (Br. 18) However, Respondent proceeds to base its entire argument on what was said rather than on what was done. It relies entirely on the wording of the resolutions and the application. It has already been conceded that the parties to this transaction did not have a clear concept of what they were trying to do and it is also obvious that they had no clear idea of the difference between the acts of a corporation as an entity and the acts of the stockholders as individuals. The persons who might have known the actual intent of the parties, Mr. Ealy and Mr. Brown, both died before trial. (R. 20) They apparently realized that the policies should not be issued in the name of the corporation and that the corporation should not execute—should not even be a nominal party to—the Agreement of July 10, 1943. Respondent ignores these latter facts and, more important, ignores the basic fact that this transaction did not and could not benefit the corporation as such but could only benefit the stockholders.

Respondent advances a theory that because the ultimate beneficiaries of this agreement could not be ascertained until an insured officer died, there was no present interest in the policy which could be held by the individual stockholders at the time of the issuance of the policy or when the premiums were paid. It then goes on to state that no trust can be created in the proceeds of a policy because “an interest which has not come into existance cannot be held in trust.” (Br. 17, 18) If Respondent means to contend that

the beneficiaries of a trust must be definitely ascertained at the time of its creation, its position is contrary to well established law. It is only necessary that the beneficiaries be definitely ascertainable within the period of the rule against perpetuities.

1 *Restatement of the Law of Trusts* 288 (Sec. 112)

2 *Scott on Trusts*, 2d ed., 807, (Sec. 112)

If Respondent means to contend that the rights of a beneficiary of an insurance policy may not be held in trust, the law appears to be settled to the contrary.

1 *Restatement of the Law of Trusts* 241 (Sec. 84, Com. b)

1 *Scott on Trusts*, 2d ed., 637, 638, 646, 647 (Sec. 82.1, 84.1)

As said by Professor Scott at page 647, referring to the same argument made here by the respondent, "The courts, however, have had no difficulty in rejecting these arguments." A beneficiary's interest in an insurance policy has so long and consistently been regarded as a present property right that further citation of authority should not be necessary. Respondent's citations, *Restatement of the Law of Trusts*, Sec. 75 and *Brainard vs. Commissioner*, 91 F. 2d 880 (CA 7th) are not in point.

The trust was set up for the benefit of the stockholders of the corporation. The fact that a stockholder would, upon sale of his stock, automatically transfer his rights as a beneficiary and, incidentally, would transfer his obligation to the other stockholders under the buy-sell agreement, would not affect the validity of any trust agreement that might be

made among the stockholders. The beneficiaries would clearly be ascertainable within the period of the rule against perpetuities.

Respondent claims that this transaction is only a variation of the common stock purchase plans and in legal effect is the same as that used in *Cummings vs. Commissioner*, 73 F. 2d. 477 (CA 1st). (Br. 19) So far as we are aware, there are two kinds of standard stock purchase plans. One, where the corporation buys the insurance, is the beneficiary and uses the proceeds to purchase and possibly retire the stock of the decedent. Second, where the stockholders take out insurance on each other's lives and use the proceeds to purchase the decedent's stock on their own behalf. The *Cummings* case was the first type except that instead of using the proceeds to purchase the stock, the stockholders agreed that they would cause the corporation to distribute the proceeds as a dividend. The proceeds actually went to the corporation and became a part of the assets of the corporation, subject to the debts of the corporation and subject to all restrictions on the declaration of dividends.

The instant case is more closely related to the second type of plan. The proceeds were received by trustees appointed by the stockholders and even though the corporation may have instructed the stockholders to do so, the stockholders were still not acting as agents for the corporation, as Respondent implies. They were acting solely for their own benefit. If an employer tells a man to go out and have dinner the man does not act on behalf of or as agent for his employer when he follows the employer's advise. The trustees had, and knew they had, only one obligation to ful-



fill with respect to the handling of the proceeds of the policy—to use them for the benefit of the stockholders in connection with their buy and sell agreement.

It is respectfully submitted, that since the stockholders made the trust agreement—and without the participation of the corporation—and since the stockholders were the sole beneficiaries under the terms of the trust agreement, the stockholders, not the corporation, were entitled to the proceeds of the insurance policy. The determination by the Tax Court that the corporation received the proceeds and distributed them to the stockholders as a special dividend was error and the decision of the Tax Court should be reversed.

*Respectfully submitted,*

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*Attorneys for the Petitioners*



Nos. 15252-54

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United States  
Court of Appeals  
for the Ninth Circuit

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No. 15252

MATANUSKA VALLEY LINES, INC., a Cor-  
poration, Appellant,  
vs.

DOROTHY NEAL and NATHANIEL NEAL,  
JR., Appellees.

No. 15253

MATANUSKA VALLEY LINES, INC., a Cor-  
poration, Appellant,  
vs.

BLANCHE THOMAS, Appellee.

No. 15254

MATANUSKA VALLEY LINES, INC., a Cor-  
poration, Appellant,  
vs.

WORDIE FRAZIER and PRINCE FRAZIER,  
Appellees.

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Transcript of Record

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Appeals from the District Court for the District of Alaska,  
Third Division

FILED

JAN 14 1957



Nos. 15252-54

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United States  
Court of Appeals  
for the Ninth Circuit

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No. 15252

MATANUSKA VALLEY LINES, INC., a Corporation, Appellant,  
vs.

DOROTHY NEAL and NATHANIEL NEAL, JR., Appellees.

No. 15253

MATANUSKA VALLEY LINES, INC., a Corporation, Appellant,  
vs.

BLANCHE THOMAS, Appellee.

No. 15254

MATANUSKA VALLEY LINES, INC., a Corporation, Appellant,  
vs.

WORDIE FRAZIER and PRINCE FRAZIER, Appellees.

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Transcript of Record

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Appeals from the District Court for the District of Alaska,  
Third Division

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## NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellants.

KAY & BUCKALEW,

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Anchorage, Alaska,

STRINGER & CONNOLLY,

Central Building,  
Anchorage, Alaska,

Attorneys for Appellees.

States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 24th day of October, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is, dismissed. (December 13, 1955.)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the sixteenth day of January in the year of our Lord one thousand nine hundred and fifty-six.

[Seal]           /s/ PAUL P. O'BRIEN,  
Clerk, United States Court of Appeals for the  
Ninth Circuit.

[Endorsed]: Filed in District Court for the Territory of Alaska, Third Division, March 16, 1956.



In the District Court for the District of Alaska,  
Third Division

No. A-8214

DOROTHY NEAL and NATHANIEL NEAL,  
JR., Plaintiffs,  
vs.

MATANUSKA VALLEY LINES, INC., a corporation, and JOHN DOE WILLIAMS and LOIS WILLIAMS, Defendants.

MOTION FOR ISSUANCE OF CERTIFICATE  
AND ORDER

Comes Now the plaintiffs in the above entitled cause and move this Honorable Court for an Order and Certificate to be entered, nunc pro tunc, directing the entry of final judgment upon verdicts I, II, III, IV and V, received and filed in the above entitled cause on September 24, 1953, and expressly determining that there is no just reason for delay.

This motion is made and based upon Rule 54(b) and Rule 63, Federal Rules of Civil Procedure, and upon all the records, papers and files in this cause.

/s/ WENDELL P. KAY,  
Of Attorneys for Plaintiffs

Acknowledgment of Service attached.

[Endorsed]: Filed November 2, 1955.

[Title of Court and Causes A-8214, A-8413, A-8666]

### MOTION

Comes now Davis, Renfrew & Hughes and moves the Court for an order substituting their name for Evander Smith, one of the former counsel of Matanuska Valley Lines, Inc., who has now left the Territory of Alaska and is no longer engaged in active practice in the Territory.

/s/ WILLIAM W. RENFREW,  
of Davis, Renfrew & Hughes

### ORDER

The above motion coming on regularly for hearing, and the Court being fully advised in the premises, now therefore

It Is Hereby Ordered that Davis, Renfrew and Hughes shall be and they are hereby entered as co-counsel for Matanuska Valley Lines, Inc., in the above entitled cause and are herewith substituted for former counsel, Evander Smith, who is no longer engaged in active practice in the Territory of Alaska.

Dated this 3rd day of January, 1955.

/s/ J. L. McCARREY, JR.,  
District Judge

Entered January 3, 1956.

Acknowledgment of Service attached.

[Endorsed]: Filed January 3, 1956.

[Title of District Court and Cause No. A-8214.]

**MOTION TO SET ASIDE VERDICT OR IN  
THE ALTERNATIVE MOTION FOR A  
NEW TRIAL**

**I.**

The defendant, Matanuska Valley Lines, Inc., in the above action, by its counsel, moves the court in accordance with Rule 50 of the Rules of Civil Procedure, that verdicts No. 1 and 2 be set aside and that it have judgment entered in accordance with its motion for directed verdicts which were made at the close of all the evidence herein.

**II.**

That said defendant in the alternative moves the court that the said verdicts be set aside and a new trial granted.

**III.**

The grounds for this motion are as follows:

1. Refusal of the trial court to comply with Rule 54 B, Federal Rules of Civil Procedure, which prevented the defendant from completing its appeal and getting a decision on the merits from the circuit court.

2. Failure of the jury to return a verdict on the cross-complaint (Verdicts No. 6 and 7), which fact requires a new trial in all cases consolidated at the trial of this cause so that one record or one appeal can be undertaken on the entire matter.

3. The absence of evidence sufficient to support the verdicts.

4. The verdicts are contrary to the clear weight of the evidence.

5. Irregularity in the proceedings by which the defendants were prevented from having a fair trial in that the defendants were denied more than a total of three peremptory challenges for all three defendants and in that the trial was conducted in an atmosphere of haste.

6. The damages awarded are excessive and appear to have been given under the influence of passion or prejudice.

7. Various errors of law occurred at the trial and were excepted to, such errors including the admission in evidence of Dr. Starr's deposition without any showing that the deponent was not available for the trial; instructions 6, 8, 14, 15, 17, 18 and the forms of verdict 1 and 2.

8. Cause A-8413 consolidated herewith was forced to trial before it was at issue and arguments over the matter in court may have influenced the jury by leading it to believe that the defendants were reluctant to have the causes come to trial.

9. Trial of the cases was compelled although none of them was at issue with respect to the cross-complaint of Matanuska Valley Lines, Inc., against the other defendants.

These motions are predicated upon the records, files, proceedings and evidence herein.

This motion supplements that dated October 5,

1953, and in no manner waives the relief sought by said former motion or the grounds set forth for such relief.

Dated at Anchorage, Alaska, this 6th day of January, 1956.

MATANUSKA VALLEY LINES,  
INC.,

By HELLENTHAL, HELLENTHAL &  
COTTIS,

/s/ By RALPH H. COTTIS,  
Attorneys for Defendant

DAVIS, RENFREW & HUGHES,

/s/ By WILLIAM W. RENFREW  
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 6, 1956.

---

[Title of District Court and Cause No. A-8214.]

## MOTION TO DISCHARGE BOND AND EXONERATE BOND SURETY

Comes now the defendant, Matanuska Valley Lines, Inc., by and through their attorneys of record, and hereby moves the court for an order discharging the cost bond and supersedeas bond heretofore filed in this cause, and for a further order exonerating the sureties from all liability thereon. This motion is based upon the following:

1. There was no judgment to supersede.
2. That the opinion of the United States Court

of Appeals for the Ninth Circuit filed December 13, 1955, does not require payment of costs.

Dated this 6th day of January, 1956.

MATANUSKA VALLEY LINES,  
INC.,  
HELLENTHAL, HELLENTHAL &  
COTTIS,

/s/ By RALPH H. COTTIS  
Attorneys for Defendant

DAVIS, RENFREW & HUGHES,  
/s/ By WILLIAM W. RENFREW,  
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 6, 1956.

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[Title of Court and Causes A-8214, A-8413, A-8666]

MOTION FOR JUDGMENT ON SUPER-  
SEDEAS BOND

Motion

Comes Now the plaintiffs, by and through John R. Connolly and Wendell P. Kay, their attorneys, and move the Court to enter judgment against E. H. Oling, Joe Blackard, Russell Swank, Lewis E. Simpson, Louis Odsather, Norman G. Lange, J. A. Columbus, M. W. Clark, Loran E. Camon, Lena Denison, John T. Campbell, Fred J. Snyder, H. M. Baker, M. B. Kirkpatrick, John H. Clawson, Frank M. Reed, J. C. Morris, Robert N. Kessler and E. D. Hillstrand, and in favor of these plaintiffs for the

total sum of \$80,000.00, and against each of them in the amount in which the said E. H. Oling, Joe Blackard, Russell Swank, Lewis E. Simpson, Louis Odsather, Norman G. Lange, J. A. Columbus, M. W. Clark, Loran E. Camon, Lena Denison, John T. Campbell, Fred J. Snyder, H. M. Baker, M. B. Kirkpatrick, John H. Clawson, Frank M. Reed, J. C. Morris, Robert M. Kessler and E. D. Hillstrand, respectively, became liable upon that certain supersedeas bond dated the 9th day of April, 1954, and filed in the above entitled cause on the said 9th day of April, 1954.

This motion is based upon the ground that the appeal in the above entitled cause taken by the defendant, Matanuska Valley Lines, Inc., has now been dismissed by the Court of Appeals for the Ninth Circuit, and upon all the pleadings, papers, records and files in this action.

Dated this 16th day of April, 1956.

/s/ WENDELL P. KAY,  
Of Attorneys for Plaintiffs

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1956.

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[Title of Court and Causes A-8214, A-8413, A-8666.]

### M. O. RENDERING ORAL DECISION

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr.,

District Judge, the following proceedings were had, to-wit:

Now at this time motions having been submitted on briefs in cause No. A-8214, entitled Dorothy Neal and Nathaniel Neal Jr., Plaintiffs, versus Matanuska Valley Lines, Inc., a corporation, John Doe Williams and Lois Williams, Defendants; cause No. A-8413, entitled Blanche Thomas, Plaintiff, versus Matanuska Valley Lines, Inc., a corporation, and John Doe Williams and Lois Williams, Defendants; and cause No. A-8666, entitled Wordie Frazier and Prince Frazier, Plaintiffs, versus Matanuska Valley Lines, Inc., a corporation, Milton T. Williams and Lois Williams, Defendants,

Whereupon, Court now denies motion for judgment on bond; denies motion exonerating sureties on the bond; denies motion for new trial; grants motion to enter judgment under Rule 54 (b).

Entered May 21, 1956.

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[Title of Court and Causes A-8214, A-8413, A-8666]

### ORDER AND CERTIFICATE

The plaintiffs having heretofore filed in the above entitled Court and matter their motion for an order and certificate directing the entry of final judgment and determining that there is no just reason for delay under the provisions of Rule 54(b), Federal Rules of Civil Procedure, and the same having



regularly come on for hearing before the Court on the 2nd day of November, 1955, Wendell P. Kay appearing as attorney for the plaintiffs, and Ralph H. Cottis as attorney for the defendant, Matanuska Valley Lines, Inc., and said motion having been argued by respective counsel, and it sufficiently appearing from all of the records, papers and files in this cause that final judgment should be entered upon Verdicts I, II, III, IV and V, received and filed on September 24, 1953, despite the failure of the jury to return a verdict on the cross-complaint of the defendant, Matanuska Valley Lines, Inc., against its co-defendant, and the Court being satisfied that there is no just reason for delay in the entry of said final judgment;

It is Ordered, Adjudged and Decreed that there is no just reason for delay in the entry of final judgment upon the verdicts returned by the jury and received and filed on September 24, 1953, and it is expressly Ordered that such final judgment be entered.

Dated this 21st day of May, 1956.

/s/ J. L. McCARREY, JR.,  
Judge of the District Court

Hearing requested with respect to foregoing.—  
12/27/55. Signed R. H. Cottis.

Entered May 21, 1956.

Acknowledgment of Service attached.

[Endorsed]: Filed May 21, 1956.

In the District Court for the District of Alaska,  
Third Division

No. A-8214

Dorothy Neal and Nathaniel Neal, Jr. Plaintiffs, vs.  
Matanuska Valley Lines, Inc., a corporation,  
and John Doe Williams and Lois Williams, De-  
fendants.

No. A-8413

Blanche Thomas, Plaintiff, vs. Matanuska Valley  
Lines, Inc., a corporation, and John Doe Wil-  
liams and Lois Williams, Defendants.

No. A-8666

Wordie Frazier and Prince Frazier, Plaintiffs, vs.  
Matanuska Valley Lines, Inc., a corporation,  
and John Doe Williams and Lois Williams, De-  
fendants.

### FINAL JUDGMENT

These Actions, first having been consolidated, hav-  
ing been regularly placed upon the calendar for  
trial, and having been reached for trial on the 15th  
day of September, 1953, the above named plaintiffs  
appearing by their attorneys, Wendell P. Kay, Her-  
ald Stringer, John Connolly, and J. Earl Cooper,  
and the above named defendant, Matanuska Valley  
Lines, Inc., appearing by its attorneys, Ralph Cottis  
and Evander C. Smith, and the above named de-  
fendants, John Doe Williams, properly known as  
Milton T. Williams, and Lois Williams, appearing  
by their attorneys, Raymond E. Plummer and Bur-

ton Biss, a jury of twelve persons was regularly impanelled to try said actions and witnesses on the part of the plaintiffs and the defendants were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider their verdict and subsequently returned into Court on the 24th day of September, 1953, and returned into open Court the following numbered verdicts, to-wit:

Verdict No. I.

We, the Jury, duly impanelled and sworn to try the above entitled cause, find as follows:

For the Plaintiff, Dorothy Neal, against both defendants in the sum of \$75,000.00.

Dated at Anchorage, Alaska, this 24th day of Sept., 1953.

A. L. Engebret, Foreman

Verdict No. II.

We, the Jury, duly impanelled and sworn to try the above entitled cause, find as follows:

For the Plaintiff, Nathaniel Neal, Jr., against both defendants in the sum of \$17,500.00.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

A. L. Engebret, Foreman

Verdict No. III.

We, the Jury, duly impanelled and sworn to try the above entitled cause, find as follows:

For the Plaintiff, Wordie Frazier, against both defendants in the sum of \$5,000.00.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

A. L. Engebretth, Foreman

Verdict No. IV.

We, the Jury, duly impanelled and sworn to try the above entitled cause, find as follows:

For the Plaintiff, Prince Frazier, against both defendants in the sum of \$3,500.00.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

A. L. Engebretth, Foreman

Verdict No. V.

We, the Jury, duly impanelled and sworn to try the above entitled cause, find as follows:

For the Plaintiff, Blanche Thomas, against both defendants in the sum of \$500.00.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

A. L. Engebretth, Foreman

Whereupon, at the request of the attorneys for the defendants, each member of the jury was polled and responded that the above verdicts were their verdicts, respectively.

Therefore, it is Considered and Adjudged by the Court that the said Plaintiff, Dorothy Neal, do have and recover of and from the said defendants, Matanuska Valley Lines, Inc., and Lois Williams, or either of them, the sum of \$75,000.00; that the said Plaintiff, Nathaniel Neal, Jr., do have and recover of and from the said defendants, Matanuska

Valley Lines, Inc. and Lois Williams, or either of them, the sum of \$17,500.00; that the said Plaintiff, Wordie Frazier, do have and recover of and from the said defendants, Matanuska Valley Lines, Inc. and Lois Williams, or either of them, the sum of \$5,000.00; that the said plaintiff, Prince Frazier, do have and recover of and from the said defendants, Matanuska Valley Lines, Inc. and Lois Williams, or either of them, the sum of \$3,500.00; that the said Plaintiff, Blanche Thomas, do have and recover of and from the said defendants, Matanuska Valley Lines, Inc. and Lois Williams, or either of them, the sum of \$500.00; and that the said named Plaintiffs recover the further total sum of \$1,845.00 as attorneys' fees in these causes, together with costs taxed at \$276.70, and hereof let execution issue.

It is Ordered, Adjudged and Decreed that there is no just reason for delay in the entry of final judgment upon the verdicts returned by the jury and received and filed on September 24, 1953, and it is expressly Ordered that such final judgment be entered.

Dated this 21st day of May, 1956.

/s/ J. L. McCARREY, JR.,  
Judge of the District Court

Hearing requested with respect to foregoing.—  
12/27/55. Signed R. H. Cottis.

Acknowledgment of Service attached.

[Endorsed]: Filed May 21, 1956.

[Title of Court and Causes A-8214, A-8413, A-8666]

### M. O. RENDERING ORAL DECISION

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, arguments having been had heretofore and on the 22nd day of May, 1956, in causes No. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., plaintiffs, versus Matanuska Valley Lines, Inc., John Doe Williams and Lois Williams, defendants; No. A-8413, entitled Blanche Thomas, plaintiff, versus Matanuska Valley Lines, Inc., John Doe Williams and Lois Williams, defendants; and No. A-8666, entitled Wordie Frazier and Prince Frazier, plaintiffs, versus Matanuska Valley Lines, Inc., Milton T. Williams and Lois Williams, defendants;

Court now finds that after consideration of the arguments had May 22, 1956, and of the reply brief filed by Defendant Matanuska Valley Lines, by leave of Court, that the ruling of May 21, 1956 in which motion for judgment on the bond was denied; motion for exoneration of sureties on the bond was denied; motion for new trial was denied; and motion to enter judgment under Rule 54 (b) was granted, shall stand.

Entered May 23, 1956.

[Title of Court and Causes A-8214, A-8413, A-8666]

**MOTION FOR A NEW TRIAL PURSUANT TO  
RULE 59 F.R.C.P.**

Comes Now the defendant Matanuska Valley Lines, Inc., in the above entitled action, by and through its attorneys Davis, Renfrew & Hughes, and moves that the verdicts and judgment in the above entitled matter be set aside and a new trial be granted pursuant to Rule 59 of the F.R.C.P.

The grounds for this motion are as follows:

1. Failure of the jury to return a verdict on the cross-complaint (Verdicts No. 6 and 7), which fact requires a new trial in all cases consolidated at the trial of this cause so that one record or one appeal can be undertaken on the entire matter.

2. The absence of evidence sufficient to support the verdicts.

3. The verdicts are contrary to the clear weight of the evidence.

4. Irregularity in the proceedings by which the defendants were prevented from having a fair trial in that the defendants were denied more than a total of three peremptory challenges for all three defendants and in that the trial was conducted in an atmosphere of haste.

5. The damages awarded are excessive and appear to have been given under the influence of passion or prejudice.

6. Various errors of law occurred at the trial and were excepted to, such errors including the admission in evidence of Dr. Starr's deposition without

any showing that the deponent was not available for the trial; instructions 6, 8, 14, 15, 17, 18 and the forms of verdict 1 and 2.

7. Cause A-8413 consolidated herewith was forced to trial before it was at issue and arguments over the matter in court may have influenced the jury by leading it to believe that the defendants were reluctant to have the causes come to trial.

8. Trial of the cases was compelled although none of them was at issue with respect to the cross-complaint of Matanuska Valley Lines, Inc., against the other defendants.

These motions are predicated upon the records, files, proceedings and evidence herein.

Dated at Anchorage, Alaska, this 31st day of May, 1956.

DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Defendant Matanuska  
Valley Lines, Inc.

Acknowledgment of Service attached.

[Endorsed]: Filed May 31, 1956.

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[Title of Court and Causes A-8214, A-8666, A-8413]

### M. O. RENDERING ORAL DECISION

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:



Now at this time, on request of counsel for defendants, for a new ruling on the motion for new trial and to preclude any doubt as to the date of filing motion for new trial, after entry of final judgment and in order to remove any question that could be raised on appeal as to the timely filing of motion for new trial in causes No. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., plaintiffs, versus Matanuska Valley Lines, Inc, a corp., and John Doe Williams and Lois Williams, defendants; No. A-8666, entitled Wordie Frazier and Prince Frazier, plaintiffs, versus Matanuska Valley Lines, Milton T. Williams and Lois Williams, defendants; and No. A-8413, entitled Blanche Thomas, plaintiff, versus Matanuska Valley Lines, Inc., John Doe Williams and Lois Williams, defendants;

It Is Ordered Court now denies motion for new trial.

Entered June 1, 1956.

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[Title of District Court and Cause No. A-8214.]

### NOTICE OF APPEAL

Notice Is Hereby Given, that Matanuska Valley Lines, Inc., a corporation, defendant above named, and General Casualty Company, a corporation, Lewis E. Simpson, Louis Odsather, J. A. Columbus, H. N. Baker, Russell Swank and Norman G. Lange, sureties, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that final judgment entered in this action on the 21st day

of May, 1956, and from the denial, on the same date, of defendants' "Motion to Discharge Bond and Exonerate Sureties".

Dated at Anchorage, Alaska, this 20th day of June, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

[Endorsed]: Filed June 20, 1956.

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[Title of Court and Causes A-8214, A-8413, A-8666]

### MOTION TO SET BOND ON APPEAL

Comes Now the defendant, Matanuska Valley Lines, Inc., a corporation, by and through its attorneys Davis, Renfrew & Hughes, and moves this honorable Court to set and establish the amount of the supersedeas bond on appeal.

Dated at Anchorage, Alaska, this 20th day of June, 1956.

DAVIS, RENFREW & HUGHES,  
/s/ DAVID H. THORSNESS,  
Attorneys for Matanuska Valley  
Lines, Inc., a corporation

Acknowledgment of Service attached.

[Endorsed]: Filed July 5, 1956.

[Title of District Court and Cause No. A-8214.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

To: The Clerk of the above entitled Court;

To: Wendall P. Kay, J. Earl Cooper and Stringer  
& Connolly, Attorneys for the Plaintiffs; and

To Whom It May Concern:

Please Take Notice that Matanuska Valley Lines, Inc., a corporation, defendant above named, and General Casualty Company, a corporation, Lewis E. Simpson, Louis Odsather, J. A. Columbus, H. N. Baker, Russell Swank and Norman G. Lange, sureties, and the appellants in this action, designate the entire record of this action as the record on appeal, and specifically direct that all records and files in the Clerk's office pertaining to the above entitled action are to be included in such record, and, among other things, such record is to include specifically, the court reporter's transcript of all proceedings had subsequent to the filing of the opinion herein of the Court of Appeals for the Ninth Circuit, said opinion being filed on December 13, 1955; and all motions and minute orders filed and entered subsequent to the filing of the opinion of the Court of Appeals for the Ninth Circuit above referred to.

The appellants respectfully show that the record in the above entitled case is the same in each of three cases, being Cause Numbers A-8214, A-8413

and A-8666, and that a consolidated record was utilized on appeal and one transcript and one record were used. In designating the entire record, the appellants followed the directions of the Ninth Circuit Court in its opinion of December 13, 1955, and accordingly, the appellants specifically designate Volumes I and II, containing 529 pages, U. S. Circuit Court of Appeals Nos. 14,529 through 14,531, inclusive, used on the appeals on the above mentioned causes, as the initial part of the record in the above captioned cause and related causes herein mentioned. The appellants respectfully request that throughout this appeal of the three causes, consolidated for purpose of trial by order of the Trial Court under date of August 24, 1953, one record and one transcript be utilized to obviate the necessity of additional costs.

Dated at Anchorage, Alaska, this 6th day of July, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed July 6, 1956.

[Title of Court and Causes A-8214, A-8413, A-8666]

## HEARING ON MOTION TO SET BOND ON APPEAL

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, causes Nos. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., plaintiffs, versus Matanuska Valley Lines, Inc., a Corp., John Doe Williams and Lois Williams, defendants; No. A-8413, entitled Blanche Thomas, plaintiff, versus Matanuska Valley Lines, Inc., a corporation, and John Doe Williams and Lois Williams; and No. A-8666, entitled Wordie Frazier and Prince Frazier, plaintiffs, versus Matanuska Valley Lines, Inc., a corporation, Milton Williams and Lois Williams, defendants; came on regularly for Hearing on Motion to Set Bond on Appeal; David Thorsness present for and in behalf of defendants, Wendell P. Kay present for and in behalf of plaintiffs; the following proceedings were had, to-wit:

Argument to Court was had by David Thorsness for and in behalf of Defendants.

Argument to Court was had by Wendell P. Kay for and in behalf of Plaintiffs.

Argument to the Court was had by David Thorsness for and in behalf of Defendants.

Whereupon, Court having heard the argument of

respective counsel and being fully and duly advised in the premises, denied motion to set bond on appeal.

Entered July 20, 1956.

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[Title of District Court and Cause No. A-8214.]

AMENDMENT OF DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL

To: The Clerk of the above entitled Court;

To: Wendall P. Kay and Stringer & Connolly, Attorneys for the Plaintiffs; and

To Whom It May Concern:

Please Take Notice that Matanuska Valley Lines, Inc., a corporation, defendant above named, and General Casualty Company, a corporation, Lewis E. Simpson, Louis Odsather, J. A. Columbus, H. N. Baker, Russell Swank and Norman G. Lange, sureties, and the appellants in this action, amend their designation of record to allow all briefs in support of motions to be deleted from the original record, but specifically designate that all bonds to stay execution to act as supersedeas bonds on file herein, filed October 30, 1953, be made a part of the record on appeal, and that the copies thereof may be reproductions by photographic process of the original bonds on file in the office of the Clerk of Court.

The appellants above named further designate as part of the record, their original designation of contents of record on appeal, and this amendment of designation of contents of record on appeal.

Dated at Anchorage, Alaska, this 16th day of August, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed August 16, 1956.

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[Title of District Court and Cause No. A-8214.]

### BOND ON STAY OF EXECUTION

Whereas, the defendant, Matanuska Valley Lines, Inc., has among other things filed motions for a new trial and for judgment notwithstanding the jury's verdict in this cause and has applied for a Stay of Execution pending the determination of said motions.

Now, Therefore, in consideration of the premises, General Casualty Company of America, a corporation organized under the laws of the State of Washington and authorized to do business within the Territory of Alaska, is bound unto the plaintiff, Dor-

othy Neal, in the sum of Eleven Thousand Three Hundred Seventy-eight Dollars and Thirty Cents (\$11,378.30) and unto the plaintiff Nathaniel Neal, Jr., in the sum of Ten Thousand Dollars (\$10,000.00).

Witness the hand and seal of General Casualty Company of America this 30th day of October, 1953.

The condition of this bond, however, is that if the pending motions for a new trial or for judgment notwithstanding the verdict be granted then this bond shall be null and void, but if the said motions be denied and timely notice of appeal to the United States Court of Appeals for the Ninth Circuit be filed and the said appeal be prosecuted with effect then this bond shall be null and void excepting that in such case it shall apply upon whatever amount of supersedeas may be fixed; providing that if the said motions be denied and the defendant, Matanuska Valley Lines, Inc., neglects to file a timely notice of appeal and prosecute same with effect then this bond to the extent indicated in favor of the respective plaintiffs individually is conditioned upon the satisfaction of the judgment herein, together with costs, interest and damages for delay.

GENERAL CASUALTY COMPANY  
OF AMERICA, Surety,  
/s/ By GRACE M. McCONNELL,  
As Attorney in Fact

[Endorsed]: Filed October 30, 1953.



[Title of Court and Causes A-8214, A-8413, A-8666]

CLERK'S CERTIFICATE ORIGINAL  
RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant (1) to the provisions of Rule 10 (1) of the United States Court of Appeals, Ninth Circuit, (2) to rules 75 (g) and (o) of the Federal Rules of Civil Procedure, (3) to the decision of the United States Court of Appeals in the above-entitled causes dated December 13, 1955, and (4) to the designations of counsel for the defendants-appellants, I am transmitting herewith the Original Papers in my office dealing with the above-entitled actions from and after October 29, 1954, together with the Court Reporter's transcript of the Court proceedings in said actions subsequent to said date, and together with plaintiffs' exhibits 1, 2-A, 2-B and 2-C, and defendants' exhibits A, B, D, H and H-1.

The original papers hereto attached are to supplement and become a part of the transcript of record in the above-entitled cases as printed by the United States Court of Appeals, Ninth Circuit, on February 4, 1955.

The papers herewith transmitted, together with the printed record hereinabove mentioned, constitute the record on appeal from the final judgment filed and entered in the above-entitled actions by the above-entitled Court on May 21, 1956, to the United

States Court of Appeals, Ninth Circuit, San Francisco, California.

Dated at Anchorage, Alaska, this 16th day of August, 1956.

[Seal]      /s/ WM. A. HILTON,  
Clerk

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[Endorsed]: No. 15252. United States Court of Appeals for the Ninth Circuit. Matanuska Valley Lines, Inc., a corporation, Appellant, vs. Dorothy Neal and Nathaniel Neal, Jr., Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: September 4, 1956.

/s/PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15252

MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, LEWIS E. SIMPSON, LOUIS ODSATHER, J. A. COLUMBUS, H. N. BAKER, RUSSELL SWANK and NORMAN G. LANGE,  
Appellants.

vs.

DOROTHY NEAL and NATHANIEL NEAL,  
JR., Appellees.

### STATEMENT OF POINTS

Matanuska Valley Lines, Inc., a corporation, and General Casualty Company of America, a corporation, and Lewis E. Simpson, Louis Odsather, J. A. Columbus, H. N. Baker, Russell Swank and Norman G. Lange, appellants, herewith present to the Court of Appeals for the Ninth Circuit the following particulars and points upon which it is claimed the Trial Court erred:

1. The appellants adopt that statement of points heretofore filed herein and made a part of the record on appeal previously had in this case, dismissed by the Court of Appeals for the Ninth Circuit by its opinion filed on December 13, 1955, former docket number 14,529.

2. In failing to grant the motion of the defendant-appellant Matanuska Valley Lines, Inc., for a new trial, filed subsequent to the filing of the opin-

ion of the Court of Appeals for the Ninth Circuit on December 13, 1955, and subsequent to the corrected judgment filed herein on May 21, 1956.

3. The denial of the motion of Matanuska Valley Lines, Inc. for motion to discharge bond and exonerate bond surety.

4. The denial of the motion of Matanuska Valley Lines, Inc. to set bond on appeal.

Dated at Anchorage, Alaska, this 22nd day of August, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed August 29, 1956. Paul P. O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

PETITION TO USE PREVIOUSLY PRINTED  
RECORD, TO USE ORIGINAL PRINTED  
BRIEFS AND FILE SUPPLEMENTAL  
BRIEFS, AND FOR RE-ARGUMENT

Come Now the appellants above named, by and through their attorneys, and petition this Honorable Court as follows:

1. That appellants be allowed to use as a portion of the printed record herein, the previously printed

record in the former appeal herein, former Docket No. 14,529, as indicated in the Court's opinion filed December 13, 1955, in addition to the record designated by appellants on file herein.

2. That appellants be allowed to use the original printed briefs in the former appeal, docket No. 14,529, and to supplement such briefs by supplemental briefs concerning matters occurring subsequent to the former appeal.

3. That this Honorable Court allow full re-argument of this appeal due to the lapse of time of proceedings had subsequent to the former appeal, and the change in this Honorable Court's membership, all occurring subsequent to the original appeal, Docket No. 14,529.

Dated at Anchorage, Alaska, this 11th day of September, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,

/s/ By DAVID H. THORSNESS,

Attorneys for Appellants

So Ordered.

/s/ H. T. BONE,

Chief Judge

/s/ RICHARD H. CHAMBERS,

United States Circuit Judge

Acknowledgment of Service attached.

[Endorsed]: Filed October 2, 1956. Paul P. O'Brien, Clerk.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14530

MATANUSKA VALLEY LINES, INC., a Corporation, vs. BLANCHE THOMAS.

### MANDATE

United States of America, ss:

The President of the United States of America.

To the Honorable, the Judges of the District Court  
for the District of Alaska, Third Division,  
Greeting:

Whereas, lately in the District Court for the District of Alaska, Third Division, before you or some of you, in a cause between Blanche Thomas, Plaintiff, and Matanuska Valley Lines, Inc., a Corporation, and John Doe Williams and Lois Williams, Defendants, No. A-8413, a Judgment was duly filed and entered on the 14th day of October, 1953; which said Judgment is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof,

And Whereas, the said Matanuska Valley Lines, Inc., a Corporation, appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Con-

gress, in such cases made and provided, fully and at large appears.

And Whereas, on the 24th day of October, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is, dismissed. (December 13, 1955.)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the sixteenth day of January in the year of our Lord one thousand nine hundred and fifty-six.

[Seal]        /s/ PAUL P. O'BRIEN,  
Clerk, United States Court of Appeals for the  
Ninth Circuit.

Entered March 16, 1956.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, March 16, 1956.

In the District Court for the District of Alaska,  
Third Division

No. A-8413

BLANCHE THOMAS,

Plaintiff,

vs.

MATANUSKA VALLEY LINES, INC., a corporation, and JOHN DOE WILLIAMS and  
LOIS WILLIAMS, Defendants.

MOTION FOR ISSUANCE OF CERTIFICATE  
AND ORDER

Comes Now the plaintiffs in the above entitled cause and move this Honorable Court for an Order and Certificate to be entered, nunc pro tunc, directing the entry of final judgment upon verdicts I, II, III, IV and V, received and filed in the above entitled cause on September 24, 1953, and expressly determining that there is no just reason for delay.

This motion is made and based upon Rule 54(b) and Rule 63, Federal Rules of Civil Procedure, and upon all the records, papers and files in this cause.

/s/ WENDELL P. KAY,  
Of Attorneys for Plaintiffs

[Endorsed]: Filed November 2, 1955.



[Title of District Court and Cause No. A-8413.]

MOTION TO DISCHARGE BOND AND  
EXONERATE BOND SURETY

Comes now the defendant, Matanuska Valley Lines, Inc., by and through their attorneys of record, and hereby moves the court for an order discharging the cost bond and supersedeas bond heretofore filed in this cause, and for a further order exonerating the sureties from all liability thereon. This motion is based upon the following:

1. There was no judgment to supersede.
2. That the opinion of the United States Court of Appeals for the Ninth Circuit filed December 13, 1955, does not require payment of costs.

Dated this 6th day of January, 1956.

MATANUSKA VALLEY LINES,  
INC.,  
HELLENTHAL, HELLENTHAL &  
COTTIS,

/s/ By RALPH H. COTTIS,  
Attorneys for Defendant

DAVIS, RENFREW & HUGHES,  
/s/ By WILLIAM W. RENFREW,  
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 6, 1956.

[Title of District Court and Cause No. A-8413.]

MOTION TO SET ASIDE VERDICT OR IN  
THE ALTERNATIVE MOTION FOR A  
NEW TRIAL

I.

The defendant, Matanuska Valley Lines, Inc., in the above action, by its counsel, moves the court in accordance with Rule 50 of the Rules of Civil Procedure, that verdict No. 5 be set aside and that it have judgment entered in accordance with its motion for directed verdicts which was made at the close of all the evidence herein.

II.

That said defendant in the alternative moves the court that the said verdict be set aside and a new trial granted.

III.

The grounds for this motion are as follows:

1. Refusal of the trial court to comply with Rule 54 B, Federal Rules of Civil Procedure, which prevented the defendant from completing its appeal and getting a decision on the merits from the circuit court.

2. Failure of the jury to return a verdict on the cross-complaint (Verdicts No. 6 and 7), which fact requires a new trial in all cases consolidated at the trial of this cause so that one record or one appeal can be undertaken on the entire matter.

3. The absence of evidence sufficient to support the verdicts.

4. The verdicts are contrary to the clear weight of the evidence.

5. Irregularity in the proceedings by which the defendants were prevented from having a fair trial in that the defendants were denied more than a total of three peremptory challenges for all three defendants and in that the trial was conducted in an atmosphere of haste.

6. The damages awarded are excessive and appear to have been given under the influence of passion or prejudice.

7. Various errors of law occurred at the trial and were excepted to, such errors including the admission in evidence of Dr. Starr's deposition without any showing that the deponent was not available for the trial; instructions 6, 8, 14, 15, 17, 18 and the form of verdict 5.

8. This cause was forced to trial before it was at issue and arguments over the matter in court may have influenced the jury by leading it to believe that the defendants were reluctant to have the cause come to trial.

9. Trial of the cases was compelled although none of them were at issue with respect to the cross-complaint of Matamуска Valley Lines, Inc., against the other defendants.

These motions are predicated upon the records, files, proceedings and evidence herein.

This motion supplements that dated October 5, 1953, and in no manner waives the relief sought by said former motion or the grounds set forth for such relief.

Dated at Anchorage, Alaska, this 6th day of January, 1956.

MATANUSKA VALLEY LINES,  
INC.,  
HELLENTHAL, HELLENTHAL &  
COTTIS,

/s/ By RALPH H. COTTIS,

Attorneys for Defendant

DAVIS, RENFREW & HUGHES,

/s/ By WILLIAM W. RENFREW,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 6, 1956.

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[Title of District Court and Cause No. A-8413.]

MOTION FOR JUDGMENT ON SUPERSEDEAS BOND

Motion

Comes Now the plaintiffs, by and through John R. Connelly and Wendell P. Kay, their attorneys, and move the Court to enter judgment against E. H. Oling, Joe Blackard, Russell Swank, Lewis E. Simpson, Louis Odsather, Norman G. Lange, J. A. Columbus, M. W. Clark, Loran E. Camon, Lena Denison, John T. Campbell, Fred J. Snyder, H. M. Baker, M. B. Kirkpatrick, John H. Clawson, Frank M. Reed, J. C. Morris, Robert N. Kessler and E. D. Hillstrand, and in favor of these plaintiffs for the total sum of \$80,000.00, and against each of them in

the amount in which the said E. H. Oling, Joe Blackard, Russell Swank, Lewis E. Simpson, Louis Odsather, Norman G. Lange, J. A. Columbus, M. W. Clark, Loran E. Camon, Lena Denison, John T. Campbell, Fred J. Snyder, H. M. Baker, M. B. Kirkpatrick, John H. Clawson, Frank M. Reed, J. C. Morris, Robert N. Kessler and E. D. Hillstrand, respectively, became liable upon that certain supersedeas bond dated the 9th day of April, 1954, and filed in the above entitled cause on the said 9th day of April, 1954.

This motion is based upon the ground that the appeal in the above entitled cause taken by the defendant, Matanuska Valley Lines, Inc., has now been dismissed by the Court of Appeals for the Ninth Circuit, and upon all the pleadings, papers, records and files in this action.

Dated this 11th day of April, 1956.

/s/ WENDELL P. KAY,  
Of Attorneys for Plaintiffs

Acknowledgment of Service attached.

[Endorsed]: Filed April 17, 1956.

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[Title of Court and Causes A-8214, A-8413, A-8666]

### M. O. RENDERING ORAL DECISION

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, arguments having been had

heretofore and on the 22nd day of May, 1956, in causes No. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., plaintiffs, versus Matanuska Valley Lines, Inc., John Doe Williams and Lois Williams, defendants; No. A-8413, entitled Blanche Thomas, plaintiff, versus Matanuska Valley Lines, Inc., John Doe Williams and Lois Williams, defendants; and No. A-8666, entitled Wordie Frazier and Prince Frazier, plaintiffs, versus Matanuska Valley Lines, Inc., Milton T. Williams and Lois Williams, defendants;

Court now finds that after consideration of the arguments had May 22, 1956, and of the reply brief filed by Defendant Matanuska Valley Lines, by leave of Court, that the ruling of May 21, 1956 in which motion for judgment on the bond was denied; motion for exoneration of sureties on the bond was denied; motion for new trial was denied; and motion to enter judgment under Rule 54 (b) was granted, shall stand.

Entered May 23, 1956.

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[Title of Court and Causes A-8214, A-8666, A-8413]

### M. O. RENDERING ORAL DECISION

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, on request of counsel for de-

endants, for a new ruling on the motion for new trial and to preclude any doubt as to the date of filing motion for new trial, after entry of final judgment and in order to remove any question that could be raised on appeal as to the timely filing of motion for new trial in causes No. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., plaintiffs, versus Matanuska Valley Lines, Inc., a corp., and John Doe Williams and Lois Williams, defendants; No. A-8666, entitled Wordie Frazier and Prince Frazier, plaintiffs, versus Matanuska Valley Lines, Milton T. Williams and Lois Williams, defendants; and No. A-8413, entitled Blanche Thomas, plaintiff, versus Matanuska Valley Lines, Inc., John Doe Williams and Lois Williams, defendants;

It Is Ordered Court now denies motion for new trial.

Entered June 1, 1956.

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[Title of District Court and Cause No. A-8413.]

### NOTICE OF APPEAL

Notice Is Hereby Given, that Matanuska Valley Lines, Inc., a corporation, defendant above named, and General Casualty Company, a corporation, surety, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that final judgment entered in this action on the 21st day of May, 1956, and from the denial, on the same date, of defendants' "Motion to Discharge Bond and Exonerate Sureties".

Dated at Anchorage, Alaska, this 20th day of June, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

[Endorsed]: Filed June 20, 1956.

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[Title of District Court and Cause No. A-8413.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

To: The Clerk of the above entitled Court;  
To: Wendall P. Kay, J. Earl Cooper and Stringer  
& Connelly, Attorneys for the Plaintiffs; and  
To Whom It May Concern:

Please Take Notice that Matanuska Valley Lines, Inc., a corporation, defendant above named, and General Casualty Company, a corporation, surety, and the appellants in this action, designate the entire record of this action as the record on appeal, and specifically direct that all records and files in the Clerk's office pertaining to the above entitled action are to be included in such record, and, among other things, such record is to include specifically, the court reporter's transcript of all proceedings had subsequent to the filing of the opinion herein of the Court of Appeals for the Ninth Circuit, said opinion being filed on December 13, 1955; and all motions and minute orders filed and entered subse-



quent to the filing of the opinion of the Court of Appeals for the Ninth Circuit above referred to.

The appellants respectfully show that the record in the above entitled case is the same in each of three cases, being Cause Numbers A-8214, A-8413 and A-8666, and that a consolidated record was utilized on appeal and one transcript and one record were used. In designating the entire record the appellants followed the directions of the Ninth Circuit Court in its opinion of December 13, 1955, and accordingly, the appellants specifically designate Volumes I and II, containing 529 pages, U. S. Circuit Court of Appeals Nos. 14,529 through 14,531, inclusive, used on the appeals on the above mentioned causes, as the initial part of the record in the above captioned cause and related causes herein mentioned. The appellants respectfully request that throughout this appeal of the three causes, consolidated for purpose of trial by order of the Trial Court under date of August 24, 1953, one record and one transcript be utilized to obviate the necessity of additional costs.

Dated at Anchorage, Alaska, this 6th day of July, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,

/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed July 6, 1956.

[Title of Court and Causes A-8214, A-8413, A-8666]

## HEARING ON MOTION TO SET BOND ON APPEAL

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, causes Nos. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., plaintiffs, versus Matanuska Valley Lines, Inc., a Corp., John Doe Williams and Lois Williams, defendants; No. A-8413, entitled Blanche Thomas, plaintiff, versus Matanuska Valley Lines, Inc., a corporation, and John Doe Williams and Lois Williams; and No. A-8666, entitled Wordie Frazier and Prince Frazier, plaintiffs, versus Matanuska Valley Lines, Inc., a corporation, Milton Williams and Lois Williams, defendants; came on regularly for Hearing on Motion to Set Bond on Appeal; David Thorsness present for and in behalf of defendants, Wendell P. Kay present for and in behalf of plaintiffs; the following proceedings were had, to-wit:

Argument to Court was had by David Thorsness for and in behalf of Defendants.

Argument to Court was had by Wendell P. Kay for and in behalf of Plaintiffs.

Argument to the Court was had by David Thorsness for and in behalf of Defendants.

Whereupon, Court having heard the argument of respective counsel and being fully and duly advised in the premises, denied motion to set bond on appeal.

Entered July 20, 1956.

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[Title of District Court and Cause No. A-8413.]

AMENDMENT OF DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL

To: The Clerk of the above entitled Court;

To: Wendall P. Kay and Stringer & Connolly, Attorneys for the Plaintiffs; and

To Whom It May Concern:

Please Take Notice that Matanuska Valley Lines, Inc., a corporation, defendant above named, and General Casualty Company, a corporation, surety, both appellants in this action, amend their designation of record to allow all briefs in support of motions to be deleted from the original record, but specifically designate that all bonds to stay execution to act as supersedeas bonds on file herein, filed October 30, 1953, be made a part of the record on appeal, and that the copies thereof may be reproductions by photographic process of the original bonds on file in the office of the Clerk of Court.

The appellants above named further designate as part of the record, their original designation of con-

tents of record on appeal, and this amendment of designation of contents of record on appeal.

Dated at Anchorage, Alaska, this 16th day of August, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed August 16, 1956.

---

[Title of District Court and Cause No. A-8413.]

### BOND ON STAY OF EXECUTION

Whereas, the defendant, Matanuska Valley Lines, Inc., has among other things filed motions for a new trial and for judgment notwithstanding the jury's verdict in this cause and has applied for a Stay of Execution pending the determination of said motions.

Now, Therefore, in consideration of the premises, General Casualty Company of America, a corporation organized under the laws of the State of Washington and authorized to do business within the Territory of Alaska, is bound unto the plaintiff, Blanche Thomas, in the sum of One Hundred Twenty-one and 70/100 Dollars (\$121.70).

Witness the hand and seal of General Casualty

Company of America this 30th day of October, 1953.

The condition of this bond, however, is that if the pending motions for a new trial or for judgment notwithstanding the verdict be granted then this bond shall be null and void, but if the said motions be denied and timely notice of appeal to the United States Court of Appeals for the Ninth Circuit be filed and the said appeal be prosecuted with effect then this bond shall be null and void excepting that in such case it shall apply upon whatever amount of supersedeas may be fixed; providing that if the said motions be denied and the defendant, Matanuska Valley Lines, Inc., neglects to file a timely notice of appeal and prosecute same with effect then this bond to the extent indicated in favor of the respective plaintiff is conditioned upon the satisfaction of the judgment herein, together with costs, interest and damages for delay.

GENERAL CASUALTY COMPANY  
OF AMERICA, Surety,

/s/ By GRACE M. McCONNELL,  
As Attorney in Fact

[Endorsed]: Filed October 30, 1953.

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[Endorsed]: No. 15,253. United States Court of Appeals for the Ninth Circuit. Matanuska Valley Lines, Inc., a corporation, Appellant, vs. Blanche Thomas, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: September 4, 1956.

/s/PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15,253

MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation,  
Appellants,

VS.

BLANCHE THOMAS, Appellee.

## STATEMENT OF POINTS

Matanuska Valley Lines, Inc., a corporation, and General Casualty Company of America, a corporation, appellants, herewith present to the Court of Appeals for the Ninth Circuit the following particulars and points upon which it is claimed the Trial Court erred:

1. The appellants adopt that statement of points hereofore filed herein and made a part of the record on appeal previously had in this case, dismissed by the Court of Appeals for the Ninth Circuit by its opinion filed on December 13, 1955, former docket number 14,530.

2. In failing to grant the motion of the defendant-appellant Matanuska Valley Lines, Inc., for a new trial, filed subsequent to the filing of the opinion

of the Court of Appeals for the Ninth Circuit on December 13, 1955, and subsequent to the corrected judgment filed herein on May 21, 1956.

3. The denial of the motion of Matanuska Valley Lines, Inc., for motion to discharge bond and exonerate bond surety.

4. The denial of the motion of Matanuska Valley Lines, Inc., to set bond on appeal.

Dated at Anchorage, Third Judicial Division, Territory of Alaska, this 22nd day of August, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,

/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed August 29, 1956. Paul P. O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

PETITION TO USE PREVIOUSLY PRINTED  
RECORD, TO USE ORIGINAL PRINTED  
BRIEFS AND FILE SUPPLEMENTAL  
BRIEFS, AND FOR RE-ARGUMENT

Come Now the appellants above named, by and through their attorneys, and petition this Honorable Court as follows:

1. That appellants be allowed to use as a portion of the printed record herein, the previously printed

record in the former appeal herein, docket No. 14,530, as indicated in the Court's opinion filed December 13, 1955, in addition to the record designated by appellants on file herein.

2. That appellants be allowed to use the original printed briefs in the former appeal, docket No. 14,530, and to supplement such briefs by additional briefs concerning matters occurring subsequent to the former appeal.

3. That this Honorable Court allow full re-argument of this appeal due to the lapse of time of proceedings had subsequent to the former appeal, and the change in this Honorable Court's membership, all occurring subsequent to the original appeal, Docket No. 14,530.

Dated at Anchorage, Alaska, this 11th day of September, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

So Ordered.

/s/ HOMER T. BONE,  
/s/ RICHARD H. CHAMBERS,  
United States Circuit Judges

Acknowledgment of Service attached.

[Endorsed]: Filed October 2, 1956. Paul P. O'Brien, Clerk.



In the United States Court of Appeals  
for the Ninth Circuit

No. 14,531

MATANUSKA VALLEY LINES, INC, a Corporation, vs. WORDIE FRAZIER and PRINCE FRAZIER.

MANDATE

United States of America, ss:

The President of the United States of America

To the Honorable, the Judges of the District Court  
for the District of Alaska, Third Division,  
Greeting:

Whereas, lately in the District Court for the District of Alaska, Third Division, before you or some of you, in a cause between Wordie Frazier and Prince Frazier, Plaintiffs, and Matanuska Valley Lines, Inc., a Corporation, and John Doe Williams and Lois Williams, Defendants, No. A-8666, a Judgment was duly filed and entered on the 14th day of October, 1953; which said Judgment is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof,

And Whereas, the said Matanuska Valley Lines, Inc., a Corporation, appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by

virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 24th day of October, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is, dismissed. (December 13, 1955).

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States the sixteenth day of January in the year of our Lord one thousand nine hundred and fifty-six.

[Seal]        /s/ PAUL P. O'BRIEN,  
Clerk, United States Court of Appeals for the  
Ninth Circuit.

Entered March 16, 1956.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, March 16, 1956.

In the District Court for the District of Alaska,  
Third Division

No. A-8666

WORDIE FRAZIER and PRINCE FRAZIER,  
Plaintiffs,

vs.

MATANUSKA VALLEY LINES, INC., a corporation, and JOHN DOE WILLIAMS and LOIS WILLIAMS, Defendants.

### M. O. RENDERING ORAL DECISION

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time motions having been submitted on briefs in cause No. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., Plaintiffs, versus Matanuska Valley Lines, Inc., a corporation, John Doe Williams and Lois Williams, Defendants; cause No. A-8413, entitled Blanche Thomas, Plaintiff, versus Matanuska Valley Lines, Inc., a corporation and John Doe Williams and Lois Williams, Defendants; and cause No. A-8666, entitled Wordie Frazier and Prince Frazier, Plaintiffs, versus Matanuska Valley Lines, Inc., a corporation, Milton T. Williams and Lois Williams, Defendants.

Whereupon, Court now denies motion for judgment on bond; denies motion exonerating sureties

on the bond; denies motion for new trial; grants motion to enter judgment under Rule 54 (b).

Entered May 21, 1956.

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[Title of Court and Causes A-8214, A-8413, A-8666]

### M. O. RENDERING ORAL DECISION

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, arguments having been had heretofore and on the 22nd day of May, 1956, in causes No. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., plaintiffs, versus Matanuska Valley Lines, Inc., John Doe Williams and Lois Williams, defendants; No. A-8413, entitled Blanche Thomas, plaintiff, versus Matanuska Valley Lines, Inc., John Doe Williams and Lois Williams, defendants; and No. A-8666, entitled Wordie Frazier and Prince Frazier, plaintiffs, versus Matanuska Valley Lines, Inc., Milton T. Williams and Lois Williams, defendants;

Court now finds that after consideration of the arguments had May 22, 1956, and of the reply brief filed by Defendant Matanuska Valley Lines, by leave of Court, that the ruling of May 21, 1956 in which motion for judgment on the bond was denied; motion for exoneration of sureties on the bond was denied; motion for new trial was denied; and mo-

tion to enter judgment under Rule 54 (b) was granted, shall stand.

Entered May 23, 1956.

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[Title of Court and Causes A-8214, A-8413, A-8666]

### M. O. RENDERING ORAL DECISION

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, on request of counsel for defendants, for a new ruling on the motion for new trial and to preclude any doubt as to the date of filing motion for new trial, after entry of final judgment and in order to remove any question that could be raised on appeal as to the timely filing of motion for new trial in causes No. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., plaintiffs, versus Matanuska Valley Lines, Inc., a corp., and John Doe Williams and Lois Williams, defendants; No. A-8666, entitled Wordie Frazier and Prince Frazier, plaintiffs, versus Matanuska Valley Lines, Milton T. Williams and Lois Williams, defendants; and No. A-8413, entitled Blanche Thomas, plaintiff, versus Matanuska Valley Lines, Inc., John Doe Williams and Lois Williams, defendants:

It Is Ordered Court now denies motion for new trial.

Entered June 1, 1956.

[Title of District Court and Cause No. A-8666.]

### NOTICE OF APPEAL

Notice Is Hereby Given, that Matanuska Valley Lines, Inc., a corporation, defendant above named, and General Casualty Company, a corporation, surety, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that final judgment entered in this action on the 21st day of May, 1956, and from the denial, on the same date, of defendants' "Motion to Discharge Bond and Exonerate Sureties".

Dated at Anchorage, Alaska, this 20th day of June, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

[Endorsed]: Filed June 20, 1956.

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[Title of District Court and Cause No. A-8666.]

### DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To: The Clerk of the above entitled Court;  
To: Wendall P. Kay, J. Earl Cooper and Stringer &  
Connolly, Attorneys for the Plaintiffs; and  
To Whom It May Concern:

Please Take Notice that Matanuska Valley Lines,

Inc., a corporation, defendant above named, and General Casualty Company, a corporation, surety, and the appellants in this action, designate the entire record of this action as the record on appeal, and specifically direct that all records and files in the Clerk's office pertaining to the above entitled action are to be included in such record, and, among other things, such record is to include specifically, the court reporter's transcript of all proceedings had subsequent to the filing of the opinion herein of the Court of Appeals for the Ninth Circuit, said opinion being filed on December 13, 1955; and all motions and minute orders filed and entered subsequent to the filing of the opinion of the Court of Appeals for the Ninth Circuit above referred to.

The appellants respectfully show that the record in the above entitled case is the same in each of three cases, being Cause Numbers A-8214, A-8413, and A-8666, and that a consolidated record was utilized on appeal and one transcript and one record were used. In designating the entire record, the appellants followed the directions of the Ninth Circuit Court in its opinion of December 13, 1955, and accordingly, the appellants specifically designate Volumes I and II, containing 529 pages, U. S. Circuit Court of Appeals Nos. 14,529 through 14,531, inclusive, used on the appeals on the above mentioned causes, as the initial part of the record in the above captioned cause and related causes herein mentioned. The appellants respectfully request that throughout this appeal of the three causes, con-

solidated for purpose of trial by order of the Trial Court under date of August 24, 1953, one record and one transcript be utilized to obviate the necessity of additional costs.

Dated at Anchorage, Alaska this 6th day of July, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed July 6, 1956.

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[Title of Court and Causes A-8214, A-8413, A-8666]

HEARING ON MOTION TO SET BOND  
ON APPEAL

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, causes Nos. A-8214, entitled Dorothy Neal and Nathaniel Neal, Jr., plaintiffs, versus Matanuska Valley Lines, Inc., a Corp., John Doe Williams and Lois Williams, defendants; No. A-8413, entitled Blanche Thomas, plaintiff, versus Matanuska Valley Lines, Inc., a corporation, and John Doe Williams and Lois Williams; and No. A-8666, entitled Wordie Frazier and Prince



Frazier, plaintiffs, versus Matanuska Valley Lines, Inc., a corporation, Milton Williams and Lois Williams, defendants; came on regularly for Hearing on Motion to Set Bond on Appeal; David Thorsness present for and in behalf of defendants, Wendell P. Kay present for and in behalf of plaintiffs; the following proceedings were had, to-wit:

Argument to Court was had by David Thorsness for and in behalf of Defendants.

Argument to Court was had by Wendell P. Kay for and in behalf of Plaintiffs.

Argument to the Court was had by David Thorsness for and in behalf of Defendants.

Whereupon, Court having heard the argument of respective counsel and being fully and duly advised in the premises, denied motion to set bond on appeal.

Entered July 20, 1956.

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[Title of District Court and Cause No. A-8666.]

## AMENDMENT OF DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To: The Clerk of the above entitled Court;

To: Wendall P. Kay and Stringer & Connelly, Attorneys for the Plaintiffs; and

To Whom It May Concern:

Please Take Notice that Matanuska Valley Lines, Inc., a corporation, defendant above named, and General Casualty Company, a corporation, surety,

both appellants in this action, amend their designation of record to allow all briefs in support of motions to be deleted from the original record, but specifically designate that all bonds to stay execution to act as supersedeas bonds on file herein, filed October 30, 1953, be made a part of the record on appeal, and that the copies thereof may be reproductions of photographic process of the original bonds on file in the office of the Clerk of Court.

The appellants above named further designate as part of the record, their original designation of contents of record on appeal, and this amendment of designation of contents of record on appeal.

Dated at Anchorage, Alaska, this 16th day of August, 1956.

HELLENTHAL & COTTIS,  
MARTIN, SHORTS & BEVER,  
DAVIS, RENFREW & HUGHES,  
/s/ By DAVID H. THORSNESS,  
Attorneys for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed August 16, 1956.

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[Title of District Court and Cause No. A-8666.]

### BOND ON STAY OF EXECUTION

Whereas, the defendant, Matanuska Valley Lines, Inc., has among other things filed motions for a new trial and for judgment notwithstanding the jury's

verdict in this cause and has applied for a Stay of Execution pending the determination of said motions.

Now, Therefore, in consideration of the premises, General Casualty Company of America, a corporation organized under the laws of the State of Washington and authorized to do business within the Territory of Alaska, is bound unto the plaintiff, Wordie B. Frazier, in the sum of Five Thousand Dollars (\$5,000.00) and unto the plaintiff Prince Frazier in the sum of Three Thousand Five Hundred Dollars (\$3,500.00).

Witness the hand and seal of General Casualty Company of America this 30th day of October, 1953.

The condition of this bond, however, is that if the pending motions for a new trial or for judgment notwithstanding the verdict be granted then this bond shall be null and void, but if the said motions be denied and timely notice of appeal to the United States Court of Appeals for the Ninth Circuit be filed and the said appeal be prosecuted with effect then this bond shall be null and void excepting that in such case it shall apply upon whatever amount of supersedeas may be fixed; providing that if the said motions be denied and the defendant, Matanuska Valley Lines, Inc., neglects to file a timely notice of appeal and prosecute same with effect then this bond to the extent indicated in favor of the respective plaintiffs individually is conditioned upon

the satisfaction of the judgment herein, together with costs, interest and damages for delay.

GENERAL CASUALTY COMPANY  
OF AMERICA, Surety,

/s/ By GRACE M. McCONNELL,  
As Attorney in Fact

[Endorsed]: Filed October 30, 1953.

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[Endorsed]: No. 15,254. United States Court of Appeals for the Ninth Circuit. Matanuska Valley Lines, Inc., a corporation, Appellant, vs. Wordie Frazier and Prince Frazier, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: September 4, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15,254

**MATANUSKA VALLEY LINES, INC.**, a corporation, and **GENERAL CASUALTY COMPANY OF AMERICA**, a corporation,  
Appellants,

vs.

**WORDIE FRAZIER** and **PRINCE FRAZIER**,  
Appellees.

### STATEMENT OF POINTS

Matanuska Valley Lines, Inc., a corporation, and General Casualty Company of America, a corporation, appellants, herewith present to the Court of Appeals for the Ninth Circuit the following particulars and points upon which it is claimed the Trial Court erred:

1. The appellants adopt that statement of points heretofore filed herein and made a part of the record on appeal previously had in this case, dismissed by the Court of Appeals for the Ninth Circuit by its opinion filed on December 13, 1955, former docket number 14,531.

2. In failing to grant the motion of the defendant-appellant Matanuska Valley Lines, Inc. for a new trial, filed subsequent to the filing of the opinion of the Court of Appeals for the Ninth Circuit on December 13, 1955, and subsequent to the corrected judgment filed herein on May 21, 1956.

In the District Court for the District of Alaska,  
Third Division

Cause No. A-8214

Dorothy Neal and Nathaniel Neal, Jr., Plaintiffs,  
vs. Matanuska Valley Lines, Inc., a Corpora-  
tion, Milton T. Williams and Lois Williams,  
Defendants.

Cause No. A-8413

Blanche Thomas, Plaintiff, vs. Matanuska Valley  
Lines, Inc., a Corporation, Milton T. Williams  
and Lois Williams, Defendants.

Cause No. A-8666

Wordie Frazier and Prince Frazier, Plaintiffs, vs.  
Matanuska Valley Lines, Inc., a Corporation,  
Milton T. Williams and Lois Williams, De-  
fendants.

## CONSOLIDATED TRANSCRIPT OF PROCEEDINGS

Before: The Honorable J. L. McCarrey, Jr.,  
U. S. District Judge. [1\*]

\* \* \* \* \*

Anchorage Alaska, May 21, 1956, 4:15 p.m.

The Court: In the case of Dorothy Neal and  
Nathaniel Neal, Jr., Plaintiffs vs. Matanuska Val-  
ley Lines, Inc., et al., Defendants, and the case of  
Blanche Thomas vs. the same corporation, and  
Wordie Frazier et al. vs. the same corporation,

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\* Page numbers appearing at top of page of original Reporter's  
Transcript of Record.

Civil A-8214, A-8413 and A-8666; this is a matter that was tried before the Honorable George W. Folta and was appealed to the Ninth Circuit Court of Appeals and on the 13th day of December, 1955, they had rendered their written opinion. The matter comes before this Court upon the following motions: a motion for judgment on bond, (2) a motion exonerating the sureties on the bond, (3) a motion for new trial, (4) a motion to enter judgment in conformance with Rule 54(b).

This matter has been submitted to the Court based upon briefs which are rather exhaustive in nature. Having considered the briefs and the argument of the law contained therein, as well as the opinion of the Ninth Circuit Court of Appeals, the Court does now deny the motion for judgment on the bond; denies the motion exonerating sureties on the bond; denies the motion for new trial and I grant the motion for the entry of judgment under Rule 54(b), and at this time, the Court would enter a minute order setting the cross-claim down for trial as soon as the Court has had an opportunity to discuss this matter with counsel for respective [29] litigants as to when would be the proper time for it. At least, for the time being, it may go on the suspense calendar. A minute order may be entered in conformance with the ruling of the Court and if the Court has time—I would appreciate you calling all counsel this afternoon since these matters were set down for argument tomorrow morning. Would you please advise counsel that their briefs cover the situation rather thoroughly, and

in order to save their time as well as the Court's, after the Court has once made up its mind, I have ruled today without the benefit of oral argument as I do not feel it would add much to that which has heretofore been submitted in their written briefs. [30]

Anchorage, Alaska, May 22, 1956,

9:45 a.m. and 2 p.m.

The Court: Mr. Renfrew.

Mr. Renfrew: I have reference, your Honor, to these consolidated cases, No. A-8214, A-8413 and A-8666, more commonly known to the Court as the Matanuska Valley Lines, Inc., Appeal. I am making this statement for the record, your Honor.

The Court: Very well.

Mr. Renfrew: Sometime ago, these various motions were filed by both the Plaintiffs and the Defendants in these cases, at which time the Court allowed the Plaintiff until May 1st to file a brief and the Defendant likewise, until May 1st to file a brief; and on the date of that arrangement in open court, the Court set the 18th day of May as a time for oral argument on the briefs. I requested that additional time—after advising the Court that we had associate Seattle counsel who were materially interested and who were assisting us in the preparation of various points of authorities in regard to this matter. Inadvertently, your Honor, the motion calendar showed that the argument was put down for the 4th of May on a subsequent motion filed by Mr. Kay and his associates. On the 1st day of May, we requested advice from Mr. Kay's



office if his brief was ready and at that time, he [32] frankly told us that the brief was not ready but he hoped to have it the next day. Our brief was completed and ready for filing on May 1st. Mr. Thorsness of our office, because of his discussion with Mr. Kay, felt that it was unnecessary to serve and file our briefs on the due date; however, when he came back to the office, it was after 5:00 o'clock and consulted with me and I said, "file that brief the first thing in the morning"; and our brief has been on file in this court pursuant to the Court's direction ever since May 2, 1956. Mr. Kay's brief was not served upon us until the end of that week—I believe it was on Friday, rather than on Monday, when it was due; now, I may be off one day there, but not more than one day. Subsequent to that time, your Honor, we, of course, discussed with Mr. Kay's office whether or not reply briefs were to be filed and because of the shortness of time, after receiving his brief, and getting it down to Seattle and giving the Seattle counsel an opportunity to go over it, Mr. Kay and Mr. Thorsness agreed between themselves that no reply briefs would be filed on either side as they anticipated bringing up the necessary points of authorities in oral argument before the Court on the 18th. On the 17th, your Honor, we telephoned the Court to find out if these arguments would be heard on the 18th and Mr. Thorsness of our office advises that your Honor at that time advised that you felt that there was enough problems involved that you had to set aside more time for the argu-

ment and that because of the 18th being pretty well congested, you put it over until today, which is Tuesday, I believe, [33] the 22nd, at 10:00 o'clock in the morning. Last night, your Honor, within two minutes of 5:00 o'clock, we received a telephone call from one of the Deputy Clerks of Court, advising us that the Court had ruled on the matter and felt that no oral argument was necessary. We may or may not have understood exactly what the Court's ruling was, but it was our understanding from conversation by Miss Strahorn—or, Mrs. Strahorn—that the Court had overruled practically—well, all of the motions with the exception of the motion for the signing of the judgment under 54(b), which the Court did.

The Court: 54(c).

Mr. Renfrew: Now, your Honor, I want to state that extensive work has gone into our preparation for argument in this case; that we feel that we can, and could have conclusively shown the Court that the authorities cited by Mr. Kay in his brief were clearly distinguishable and since we have not now that opportunity, your Honor, in order to preserve the record, we wish to file a reply brief wherein we have set forth our position with regard to every authority cited by Mr. Kay, which I feel clearly shows that they're not in point in the case at bar. I ask permission to do this, your Honor, after frankly stating to you that we kept the office force on very late last night in order to have this prepared. We did not anticipate doing this because of the agreement between counsel that

due to the insufficiency of the time and due to the fact that even on Friday, the Court advised us [34] that the matter would be heard today, we certainly expected to have an opportunity. I want to state, your Honor, that we seriously object to the Court's ruling in this matter, without giving us an opportunity to argue the case, but, of course, we view your Honor's judgment and merely ask at this time permission to file a reply brief which we have prepared and which is the gist of our argument—would have been the gist of our argument at 10:00 o'clock this morning.

The Court: The motion is granted. The Court took the position that the briefs were in and based upon the briefs and also the decision of the Ninth Circuit Court of Appeal, I felt that arguments would not assist the Court any as the Court pretty well had made up its mind based upon the briefs and upon that decision. Now, the Court would be glad to have you file your reply briefs as I didn't know they were coming in and nothing about it and didn't know about the agreement you made with one another as to the withholding of the reply briefs and the Court will consider those briefs and if by chance they would dissuade the Court from any ruling heretofore made, I'd be glad to reconsider it.

Mr. Renfrew: Very well, your Honor. Now, I want to state to the Court at this time that this arrangement for not filing any reply briefs due to the shortness of time and the agreement between counsel was made between Mr. Thorsness and Mr.

Kay and I want the record to show that Mr. Thorsness is here [35] in court and heard me make that statement and I am stating it because that is what he told me. If it isn't so, I want him to stand up and say so, right now. I don't want any misunderstanding on that.

The Court: Mr. Thorsness, there is no misunderstanding between yourself and the Court as to the filing of these reply briefs, is there?

Mr. Thorsness: No, your Honor, that is correct. I talked to Mr. Kay and he indicated, or asked me if I intended to file a reply brief and I said I didn't believe so; I thought we'd deal with it in oral argument and he agreed and indicated he wouldn't file a reply brief, either.

The Court: Mr. Arnell.

Mr. Arnell: Your Honor, yesterday I filed an appearance on behalf of—I think five people, who signed as sureties and Mr. Kay signed the stipulation permitting the appearance and also the adoption of the points which Mr. Renfrew has raised on behalf of his clients. I want to be sure the Court has no objection to the manner in which I proceeded and Mr. Renfrew has consented, too, that we may take advantage of the points raised in their briefs.

The Court: Well, certainly, that wasn't very timely, counsel. I had no notice of it, nor at this time don't even know what your position is or what your grounds might be for appearance. [36]

Mr. Arnell: If your Honor please, I realize that I might be criticized by the Court for filing

those papers yesterday; however, I have checked the rules and there is no specific procedure, so far as I can find, with reference to procedure of this kind.

The Court: Well, excepting this: the appearance of all parties, after the case has of course been filed—and you have not been sued or made a party to it—must be upon the order of the Court.

Mr. Arnell: I think, your Honor, based upon the research that I have done, that the motion which was filed by the Plaintiffs in this action is sufficient to enable the Court to render judgment based on the mandate of the appellate court.

The Court: Well, now, let's stay with the issue, as to your right to come in without order of the Court.

Mr. Arnell: Well, these sureties, your Honor, are made parties by virtue of the motion.

The Court: What motion—that the Plaintiffs made?

Mr. Arnell: Yes, the motion for judgment against the sureties.

The Court: Well, of course, they—on the ruling of the Court, though, they haven't been affected adversely because the—just a moment, please. Let me read my notes here. (At this time, the Court read over his notes.) You are referring to the motion exonerating the sureties on the bond? [37]

Mr. Arnell: No, I am referring to the Plaintiffs' motion, your Honor, for judgment on the supersedeas bond that was noted by Mr. Kay and

Kay and I want the record to show that Mr. Thorsness is here [35] in court and heard me make that statement and I am stating it because that is what he told me. If it isn't so, I want him to stand up and say so, right now. I don't want any misunderstanding on that.

The Court: Mr. Thorsness, there is no misunderstanding between yourself and the Court as to the filing of these reply briefs, is there?

Mr. Thorsness: No, your Honor, that is correct. I talked to Mr. Kay and he indicated, or asked me if I intended to file a reply brief and I said I didn't believe so; I thought we'd deal with it in oral argument and he agreed and indicated he wouldn't file a reply brief, either.

The Court: Mr. Arnell.

Mr. Arnell: Your Honor, yesterday I filed an appearance on behalf of—I think five people, who signed as sureties and Mr. Kay signed the stipulation permitting the appearance and also the adoption of the points which Mr. Renfrew has raised on behalf of his clients. I want to be sure the Court has no objection to the manner in which I proceeded and Mr. Renfrew has consented, too, that we may take advantage of the points raised in their briefs.

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The Court: Well, of course, they—on the ruling of the Court, though, they haven't been affected adversely because the—just a moment, please. Let me read my notes here. (At this time, the Court read over his notes.) You are referring to the motion exonerating the sureties on the bond? [37]

Mr. Arnell: No, I am referring to the Plaintiffs' motion, your Honor, for judgment on the supersedeas bond that was noted by Mr. Kay and

Mr. Connolly and served on all, I think, of the sureties.

The Court: Of course, that motion was denied so you, haven't been adversely affected.

Mr. Arnell: You mean the Plaintiffs' motion for judgment has been denied?

The Court: Yes, on the bond, yes.

Mr. Renfrew: Your Honor, so that it won't take up a lot of the Court's time, as I understand it now, the Court is going to reconsider its ruling and that—well——

The Court: No, the Court will read your brief, your reply brief, at your request and then, if by chance, you have been able to dissuade the Court from its prior ruling, the Court will at that time reconsider the ruling; otherwise, the ruling will stand as it is, but I will certainly give your reply brief the benefit of the law and research on the points that you raised, and, if by chance, it's persuasive, the Court at that time would reconsider it, yes.

Mr. Renfrew: Very well, your Honor, I will have to ask the Court to—if the Court would notify us then so that we would be in a position of knowing just when the Court has—I mean, I don't want to advise your Honor, but we've got to tell Seattle now, our corresponding attorneys, what [38] the position in this matter is, and they're going to want to know when you have considered this brief and found it not "persuasive", so to speak.

The Court: Well, counsel, have you ever had a



ruling of the Court that you haven't been advised? In other words, it will follow the regular——

Mr. Renfrew: Yes, your Honor, I have; not through any fault of yours, but I will say I have——there have been rulings of this Court that I haven't been advised of.

The Court: That being the case then, that is, I am sure, contrary to the instructions of the Court then. I think it must have been inadvertence.

Mr. Renfrew: I want to make a further point, your Honor, that if after reading that brief, the Court has some questions, we would be most happy and desirous, and urge the Court to allow us to come in and argue the point.

The Court: Very well. Now, do you have another point, Mr. Arnell?

Mr. Arnell: Well, I still haven't got clear, your Honor, what the position of the Plaintiffs' motion for judgment is.

The Court: Well, to restate the Court's position, the motion for judgment on the bond was denied. Now, does that——

Mr. Arnell: Upon what conditions?

The Court: Upon no conditions; just that it was denied.

Mr. Arnell: Then, as I understand the ruling [39] of the Court, it is to the effect that the Plaintiffs do not have judgment against any of the sureties?

The Court: That is correct.

Mr. Arnell: Is the bond continued then?

The Court: On that point it's opened and I ex-

pect counsel to raise that point and come into court and state their position on that matter.

Mr. Arnell: If your Honor please——

The Court: It's my opinion that the bond should be continued at this time, but I'd be glad to hear counsel. The Court made no ruling as to the bond itself.

Mr. Arnell: Well, if your Honor please, the Court is well aware of what prejudice can result to these various sureties. At the time that the bonds were filed, we had a going corporation. Now, we have a receivership and an insolvent corporation and the status of the various parties materially changed and——

The Court: The Court will hear counsel on the question of continuing the bond—not now, because I want you to give some research on it.

Mr. Arnell: May we have it set down for a definite time, your Honor?

The Court: Could you do it this afternoon at 2:00 o'clock?

Mr. Arnell: Could it come up on regular motion day?

The Court: Well, it could, excepting this: that [40] it's been requested that motion day go over until the 8th of June because a lot of counsel are going down to this Alaska Bar Association and the Court wants to cooperate with you on that basis. As a matter of fact, I think there's about six or seven from Anchorage going down and may not have an opportunity for them to come back in time for the motion calendar which would be

on June 1st; so the Court was requested yesterday by Mr. Dunn who had polled a number of the attorneys and it seems to be the consensus of the attorneys that they prefer it go over until June 8th; and based upon that request and representation, at this time the Court would ask the Clerk to enter a minute order calling the next motion calendar for June 8th.

Mr. Arnell: If counsel can get together, your Honor, and arrive at another time, would that be agreeable with the Court?

The Court: Excepting this, counsel: it isn't very convenient to the Court to let counsel say when it's convenient for them. I've got to plan my work and I hope that you could follow in my plans somewhere along that line.

Mr. Arnell: I fully understand, your Honor. The only reason I made that inquiry is that I will have to be in Fairbanks on the 8th of June.

The Court: What I had in mind, counsel, that—you say you're prepared to argue the merits of the case this morning. Now, the Court may be wrong, I don't know, but it's the Court's [41] considered opinion that argument would be of no avail to the Court and therefore, would consume time on the part of counsel, as the Court's made up its mind as to the briefs heretofore submitted, based upon the decision of the Ninth Circuit Court of Appeals. However, I would think that you could argue the one point about the bond by 2:00 o'clock this afternoon and we could dispose of it today.

Mr. Renfrew: Your Honor, we are ready now

to argue that point. What bonds are you talking about, the supersedeas bonds?

The Court: No, the continuing of the bond for the purpose of completing the appeal.

Mr. Renfrew: You have already ruled that the supersedeas bonds are good and now—but, you haven't ruled on the question of the cost bond.

The Court: No, no, the Court has ruled that motion for judgment on the bond is denied, number one——

Mr. Renfrew: I understand that.

The Court: Number two, the motion exonerating sureties was denied.

Mr. Renfrew: The motion exonerating the sureties on the supersedeas——

The Court (continuing): ——on the bond, yes, is denied.

Mr. Renfrew: Then, what is there left to argue then?

The Court: Only this one point, whether or not [42] the bond should continue for completing the appeal.

Mr. Renfrew: What bond, your Honor, the cost——

The Court: The supersedeas bond.

Mr. Renfrew: Well, if the Court has ruled that the supersedeas bond—the sureties are not exonerated on it, I am frank to confess to your Honor that I assumed that by that ruling the Court meant if the sureties weren't exonerated the bond was in effect.

The Court: That is what the Court thought,

also, but so there would be no doubt, I thought counsel would raise that point and come into court and we would have a discussion on that basis.

Mr. Renfrew: Well, we are prepared to argue, your Honor, that the supersedeas bond should not stand and we are prepared to argue it at any time. We were prepared on the 18th. We are prepared this morning and we'd be glad to be here at 2:00 o'clock this afternoon to argue that point.

The Court: Let's set it down at that time then. That will give you all a chance to look into it a little bit.

Mr. Renfrew: May we be excused?

The Court: Yes, you may be excused.

Reconvened at 2:00

The Court: Are there any ex parte matters to come before the Court? (No answer.) I'll tell you [43] what we better do: we will dispose of Mr. Arnell's problem first since that was left undetermined this morning. Mr. Arnell, I have given some thought to that. I direct your attention to Rule 24, and if I remember correctly, you would come under Rule 24 (a3); that's intervention; and I feel if you make the proper motion to intervene in this case, that you should be allowed the motion. So, if you will formalize that, it can come in by stipulation. You can come in only with the consent of the Court under this rule.

Mr. Arnell: If your Honor please, I thought I was resisting the motion for judgment and I filed the papers that I did and it wasn't until this morn-

ing that I was aware that the Court denied that motion, so I would agree with the Court until such time as there is an attempt imposed for liability on the bondsmen and perhaps I would have no standing in court, or the bondsmen themselves.

The Court: Then we are agreed, are we, counsel; then if you desire to come in, that's what you will do then? Now, getting back to the other matter, I am wondering, counsel, if the Court hasn't more or less determined that point without any further argument and without any further discussion. Now, I am not passing upon whether the bond was then good or is now good, but by denying the motion exonerating the sureties on the bond, and denying the motion for judgment on the bond, hasn't the Court in substance, stated: "Well, you had a bond, and whatever value that was, still remains". I think it's just that simple. [44]

Mr. Thorsness: If your Honor please——

The Court: Mr. Thorsness.

Mr. Thorsness: Mr. Kay, Mr. Connolly: It's our position in that respect, that we posed the question as to whether or not this bond was or was not good. Now——

The Court: In that respect, though, Mr. Thorsness, may I interrupt you, please? Isn't that a question that is to be determined by the Ninth Circuit and not by this Court?

Mr. Thorsness: If your Honor please, in the light of the circumstances of this case, the way they have developed; that is, the appeal, the dismissal, the return of this matter to the Court and then

our motion for exoneration on those bonds, I think that question comes back to the trial court. Now, as to the new appeal, as referred to in the opinion, then the validity of any of those bonds on appeal as far as the perfecting the appeal is concerned, I imagine it would be up to the Circuit Court, but we don't have that problem here. The problem we have here is the validity of the bonds posted for the first appeal; the appeal that was dismissed. Now, judgment was made—pardon me; motion for judgment was made; motion for exoneration was made. Now, I think, quite clearly, the Court could have granted either one of those motions as far as being within the power of the Court, within the jurisdiction of the Court to decide that question. Now, the Court has denied both motions. Now——

The Court: ——and likewise denied the motion [45] for new trial, which was likewise denied by Judge Folta who tried the case, who was in a better position than this Court.

Mr. Thorsness: Yes, your Honor, I understand that, but the thing, the question, that is not clear in our mind and I think should be determined by the trial court here, is whether or not these supersedeas bonds that were posted for the first appeal, are now good or not good. If they're good, then they possibly could be continued, which we oppose if they are. If they are not good, then I submit we are entitled to exoneration of the sureties. Now, we'd like to be heard concerning the question of continuing these bonds because, your Honor, I be-

lieve in effect, by refusing both motions, the Court has in effect continued those bonds. Now, I am not—from what I have heard the Court say this morning and now, I don't believe it's the Court's intention to continue those bonds as such and make an order to that effect, and accordingly, we'd like to be heard as to the circumstances and the law as to continuing those, the first supersedeas bonds.

The Court: Well, in that respect, the Court takes the position that that isn't a matter that has to be determined by this Court, whether or not those bonds are continued. I am not passing upon the validity of the bond at that time or now and I don't feel I should. This is a matter that was remanded back for compliance with Rule 54 (b); and I corrected you this morning and I am in error; it's 54 (b) rather than 54 (c); as to whether or not the bond on appeal was good then, it's not [46] to be determined by the Court at this time.

Mr. Thorsness: Well, if your Honor please, the question of whether or not these bonds are good, I think, is very vital here, because we are in a position now of having to perfect a new appeal. The Circuit Court has said in their opinion that a new appeal will lie. We'll use the same record. Now, I think we will almost have to have a ruling as to whether or not these bonds are continuing and are good in order to stay execution.

The Court: Well, what are you appealing this time, counsel? All you are appealing is this judgment.



Mr. Thorsness: Well, if your Honor please, that is correct. We may appeal other things; I don't know right now, but possibly, the question as to whether or not these bonds are continuing and good, I think the effect of the Court's ruling is that they are good and they are continuing by the denial of our motion for exoneration of sureties.

The Court: Why shouldn't that then be determined by the Ninth Circuit Court of Appeals rather than by this Court?

Mr. Thorsness: Well, if your Honor please, the Appellate Court passes on matters that were disposed of in trial court. Now, if the Court is going to make its ruling that the bonds are good and are continuing, then the Appellate Court has something to pass on.

The Court: At this time, I am not in a frame of mind to even pass on whether they are good, or [47] were good. I think that is a matter to be determined by the Ninth Circuit Court of Appeals.

Mr. Thorsness: If your Honor please, that puts us in rather an odd position as far as the subsequent appeal is concerned. We don't know whether we posted a good bond or not.

The Court: Well——

Mr. Kay: Your Honor——

The Court: Let Mr. Thorsness finish his argument. Did you want to add anything to that, Mr. Renfrew?

Mr. Renfrew: Yes, your Honor, I would like to add two things to it.

The Court: Very well.

Mr. Renfrew: I think the vital question, your Honor, is whether or not the Appellate Court even has any jurisdiction on those supersedeas bonds at this time. If your Honor would recall, the opinion in this case says, not once, but in two or three different places, that a new appeal must be taken. Now, your Honor, that is what Mr. Thorsness is asking the Court for here, is if a new appeal must be taken, does this Court contend that the supersedeas bonds, which are presently before the Court, supersede a judgment which was not signed until yesterday? This is the question, your Honor. The Ninth Circuit Court of Appeals said in effect, there was no judgment. Now, that is the exact wording, practically, of their opinion. The judgment was fatally defective; there was no judgment. Now, it said: "We are going to send this back to the Low Court". Now, the Low Court can do [48] anything it wants to; and they specifically reiterated in the opinion that they weren't telling the Low Court what to do. You could grant a new trial; you could sign the judgment. I believe they did say you couldn't sign it *nunc pro tunc*. I believe they did say that, but they specifically——

The Court: No, I don't quite agree with that, but go ahead.

Mr. Renfrew: Well, I am satisfied they did say that, right in the opinion, and I think I can point it out to you if you want to hear that argument, but I am convinced that they said "a new appeal may be taken, or will have to be taken if you want to bring this back down here, if you are

not satisfied with what the Low Court does, and in that event, we have the power and do hereby provide that you may use that printed record which was heretofore submitted". Now, that's about all that opinion says. Now, your Honor, this is what we are faced with: The Court has now made a valid judgment in this case, and if we comply with the Ninth Circuit Court of Appeals' opinion, we must file a new, N-E-W, appeal. Now, we are asking this Court to exonerate the sureties on the old supersedeas bonds which were put up to supersede a judgment and the Ninth Circuit Court said there is no judgment. Now, if your Honor doesn't decide that those supersedeas bonds are invalid, it must necessarily follow that, your Honor finds that they are valid, and if you find that the supersedeas bonds which are now in this file are valid [49] bonds, then it must necessarily follow that you state, "those bonds supersede and stay execution on a judgment which I signed May 21, 1956", although those supersedeas bonds were signed two years ago to stay execution on a judgment which the Circuit Court of Appeals has held invalid. Now, that's our problem, your Honor. I can appreciate the Court's feeling that "let the Ninth Circuit Court decide all of the issues in this case", but, your Honor, we have got to have some guidance here. If the Court rules that those supersedeas bonds are good, in effect, you must do just what I have stated; you've got to hold that the bonds are not being used for the purpose in which they were made, but by some theory, unknown to me,

you are holding that they were good bonds for a judgment which was signed years later. Now, I don't hold to that type of reasoning, your Honor, but if you don't do that, and don't say they are or they aren't good, I don't know what we are supposed to do to stay execution on this judgment that you filed—or, signed yesterday. There is nothing to prevent the Plaintiff from levying execution right within the ten day period. Now, that, your Honor, is our big problem. Now, I think that I am perfectly—I don't want to belabor the point, but we have extended authorities to the effect that those supersedeas bonds are void; they're no good, and if that is true, your Honor, in perfecting our appeal, we have got to put up new supersedeas bonds if we wish to stay execution, and we'd have to put up a new cost bond if the cost bond is invalid because the bond that was up [50] there was for costs for judgment which the Circuit Court has held invalid and the Circuit Court, when they returned it here, found that the Plaintiff in the action was not entitled to any costs.

The Court: But, Mr. Renfrew, I am just going back on my recollection of a bond on appeal, but doesn't that bond provide that it shall be for the security of payment of all damages and costs which the appellant may cost the appellee in the event that it is not sustained on the appeal?

Mr. Renfrew: The bond, I think, is written in the words of the rule that requires the bond—and I think that substantially, your Honor has stated about what that bond provides, but, your Honor,

if you look at the opinion from the Ninth Circuit Court, they didn't grant anybody anything in the way of relief of costs on appeal. In fact, they said there is nothing to appeal from here; there is no judgment; the whole thing is void.

The Court: What I was trying to point out to you is this: Now, it's come back to the Court to enter judgment. That judgment has been entered and now this judgment will go up.

Mr. Renfrew: Well, does it go up automatically when the Circuit Court says a new appeal must be filed? That judgment doesn't go up if we don't file a new appeal.

The Court: That's true.

Mr. Renfrew: All right, now then, we have to do something. Now, if we file a new appeal, that judgment will go up and if we don't file a supersedeas bond, the Plaintiff in this action can [51] levy execution.

The Court: I don't know as I agree with you on that.

Mr. Renfrew: Well, I am asking the Court to either agree with me or disagree with me, and I don't care what you do. If you will hear argument I think we can convince you that those supersedeas bonds to supersede a judgment which was non-existent is just as non-existent as the judgment. Now, that's it in the nut shell—our argument, and I think we have the law to support it, but I feel, your Honor, that we are entitled to the Court's ruling on that very question because I think we are at a loss—I don't know how now that we can

stay execution and I will state to your Honor, frankly, that we would have to appeal from the Court's ruling. If you will just rule one way or the other, one of us will appeal from that ruling if necessary along with the appeal on the judgment, but we must have a determination, your Honor. Now, I am—I don't want to take any more of your time. I merely did that to show you what our contention as to our position is.

The Court: Of course, the Court was aware of your position and the Court feels that I have indirectly determined what you are asking me to determine by the rulings heretofore made upon the motions made. I think it's a moot matter right now, but I could be in error on that point.

Mr. Kay: May I be heard very briefly?

The Court: Just a moment. May we get [52] Mr. Williams in?

Mr. Kay: I wasn't going to make any argument at all on the merits of this thing because I am just going to say I agree with the position of the Court that by the rulings of the Court made yesterday, the Court—there is nothing left here today to argue on the point that the Defendant has attempted to raise. The Court ruled that we should not receive judgment on the bond. The Court also ruled the bond should not be exonerated at this time; therefore, they have asked in effect, that the Court exonerate the bonds indirectly by ruling whether or not they continue; of course, hoping that the Court would rule that they do not continue. I don't think that is a question before the

Court at this time until they file their notice of appeal of whether it's before the Court at that time or not; I don't know. When they file their notice of appeal then the question, after the ten day period, or during the ten day period, then the question could be raised as to whether or not an additional or substituted supersedeas bond is or is not necessary. Now, in my opinion, in my opinion, no different supersedeas bond is necessary. Your Honor, I want to say that the Plaintiffs are satisfied with that supersedeas bond. We don't ask to supply a different supersedeas bond on that appeal and we don't ask for a new bond or question the validity of these bonds upon the continuing of this appeal. It's all very well to pick a word or phrase out of the Court's opinion and say that there is no judgment in this case. Well, as a matter [53] of fact, there is. It's in the file; everybody can look at it. It's what they have appealed from; they have recited that there was a judgment, and there was, in fact, a judgment in the case without any question. Now, it's also very well to say that this is a new appeal. As a matter of fact, this isn't a new problem. In accordance with the Ninth Circuit, it has faced this on a number of cases. I have cited in my memorandum to the Circuit Court, which is not before this Court—I'd like just to refer to them because the Ninth Circuit has in fact passed on this, not on the precise question of involving the bonds, but just upon the fact that it's a continuing appeal when they sent it back to have a judgment corrected or to have some action

taken under Rule 54 (b). You won't find a case on which the Ninth Circuit has dismissed the appeal completely. They always leave it open for continuance. In other words, if they say if you want to come back up here now, as they did in this case, we will order the use of the previously printed record. In fact, in this case, they might just go ahead and decide the case because they have already heard oral argument on it.

The Court: Of course, that was the point I was going to make a little later on. I doubt if it will ever have to be argued again excepting the judgment which has now been entered by the Court;—

Mr. Kay: And—

The Court: —I don't know. [54]

Mr. Kay: I don't know either. It might be that both sides will desire additional oral argument, that the Court will grant it, but the briefs have already been filed; the record is there. All that is necessary is to notify the Court that we take a new appeal and as far as this supersedeas bond question is concerned, we are not going to use it. We are satisfied that those bonds are in effect. Unless they raise it themselves, it won't be raised, because we are going back to the Ninth Circuit if they go on the strength of those supersedeas bonds. We consider them still in effect. We are satisfied with them and if they want to supply, or raise the question after they filed notice of appeal, —as of now we don't know whether they're going to appeal or not. If they're not going to appeal, then it isn't before the Court at this time because



you have denied our motion on judgment on the bond, so we are not in a position right now to ask for judgment again on them. We have—and then, so I take the position that this question that they have attempted to raise is just not before the Court and that, your Honor's ruling that they might not agree with them. I think they're perfectly proper. I think they have decided the issue before the Court and I think it's now up before it. If they wish to go ahead with the appeal, file a new notice of appeal—then let's see what the Ninth Circuit has to say.

The Court: Do you wish to reply, Mr. Renfrew?

Mr. Renfrew: It's my understanding from [55] counsel's remark that he concurs we must file a new appeal. He says he doesn't know whether we are going to file an appeal or not, so the question isn't before the Court; and if we don't file an appeal, he would attempt to move against the supersedeas bonds; and if we do file a new appeal, why, he's perfectly willing to accept the supersedeas bonds. Now, your Honor, the position is entirely different now than it was when those bonds were filed, completely different. Now, the Ninth Circuit Court said a single new appeal could be made herein. Now, of course, if we don't file the new appeal, he can levy execution on the judgment. Now, your Honor, whether we file a new appeal or whether we don't, cannot validate or invalidate supersedeas bonds that are before this Court right now. What would the mere filing of that appeal have to do with the validity of the supersedeas

bonds that are presently before the Court. They are before the Court; the whole case was sent back and those bonds are before the Court. Now, can't your Honor concede of the circumstance wherein if the Court here rules that those supersedeas bonds are good bonds, we might appeal, or we might not, because we would know that we had supersedeas bonds up to stay an execution which this Court had said were good.

The Court: Well, Mr. Kay takes the position, Mr. Renfrew, that the bonds are good.

Mr. Renfrew: Well, I am not concerned about Mr. Kay's position, your Honor. I want to know your position. I don't care what Mr. Kay thinks, whether they're good or not good. [56]

The Court: Well, I thought that would be an indication to you as to the fact that he apparently does not intend to levy upon it or to oppose your appeal if you don't put up additional bonds.

Mr. Kay: Correct.

Mr. Renfrew: Now, your Honor, if I don't put up additional bond—I mean, if I don't file a notice of appeal, I can only assume that he's going to attempt to get judgment against the supersedeas bonds and I don't believe it's incumbent upon me to wait that long to find out whether or not the Court holds those bonds to be valid.

The Court: Well, of course, counsel, I feel that I have indicated to you, at least twice—I will do it the third time—I have indicated by my prior rulings. Now, I don't know how much more specific I should be than that.

Mr. Renfrew: Well, I ask your Honor—I don't mean to belabor the point, your Honor, but does the Court feel that you have ruled that those bonds are valid and is that the Court's ruling?

The Court: The Court has ruled as heretofore indicated. I think that is clear enough.

Mr. Renfrew: Well, your Honor, then I ask for an enlightenment. I am not clear as to whether or not this Court has ruled those supersedeas bonds are valid and continuing or not valid and not continuing. [57]

The Court: I haven't even ruled on that point, but by the ruling I have made, I think you should know where the Court stands and I think that is sufficient and I think the Ninth Circuit Court of Appeals should determine any other issue from here on out.

Mr. Renfrew: Well, as I said, I don't want to irritate the Court——

The Court: Well, you won't, counsel.

Mr. Renfrew: ——but I will still state for the purpose of the record, that I don't know whether the Court has held those bonds to be valid and continuing or invalid and not continuing and I would ask the Court to state whether it is the Court's ruling that they're valid and continuing or invalid and not continuing at this time.

The Court: And I—let the record show that I told you three times what my opinion is and it's still the same, that the ruling heretofore has determined that fact. Now, if you have—I don't want to foreclose any argument of counsel. If you

feel that you have something that the Court should be apprised of by way of argument of the law, I wouldn't want to preclude you from having that opportunity, Mr. Renfrew, Mr. Thorsness and Mr. Arnell.

Mr. Renfrew: Well, I will ask the Court if you have read our reply brief that was presented this morning?

The Court: Yes, I did; I read that between [58] the time it was filed and lunch.

Mr. Renfrew: Would your Honor care for any enlightenment on the matters therein contained?

The Court: No, I would not, and furthermore, the Court is of the same frame of mind as it was yesterday when I ruled on those motions that are now a matter of record.

Mr. Arnell: If your Honor please, in regard to individual bondsmen, if they desire to appear further in these proceedings, do I understand your Honor's ruling to be that we would have to file a petition to intervene and then after that has been accomplished, to file whatever motions we might deem appropriate under the circumstances that this record is now in?

The Court: Yes, and while I am not saying this to be final, it would be my cursory considered opinion that whatever position you take will probably have to be determined on appeal.

Mr. Renfrew: Your Honor, we would like to be heard briefly on one point that is not covered in our brief concerning the matter which we thought we were coming in here for after our hearing in

the morning.

The Court: The Court would like to do this, Mr. Renfrew; I could hear a matter that was set down for 2:30 and you may get your things together at that time.

(Thereupon, the Court took up other matters in court.)

Recessed at 2:35 o'clock p.m.

Reconvened at 2:45 o'clock p.m. [59]

The Court: Mr. Kay.

Mr. Kay: May it please the Court, I just wanted to say, I don't know what Mr. Thorsness is going to argue. I had an understanding—I know Dave will agree with me on this—that it was our understanding that neither one was going to file reply briefs.

The Court: We have been over that this morning.

Mr. Kay: I see. Well, if this point should raise, that he's going to argue, should raise some point that I haven't had an opportunity to cover or feel that I should cover, I'd like permission to file a responsive brief——

The Court: Very well.

Mr. Kay: ——if necessary.

The Court: Mr. Thorsness.

Mr. Thorsness: If your Honor please, in connection with Mr. Kay's remark, our agreement that we not file a reply brief was based on the understanding that we were to have a chance to argue this orally.

The Court: That is clearly understood.

Mr. Thorsness: Now, the point that I wish to urge upon the Court at this time concerns, in effect, the continuing of these bonds. Now, it is my feeling that although the Court hasn't said so in so many words, by the Court's ruling, it has continued these bonds and it is to that action of the Court that I wish to address my remarks. [60]

Now, this question is discussed generally in Volume 50, American Jurisprudence — Suretyship, Section 320, and following—or, particularly, at Page 1116, Section 321, concerning the change, the alteration of the circumstance and in particular, the risk involved as respects the surety. Now, the citation I gave the Court reads as follows: "If, however, the change or alteration is prejudicial, the Surety is discharged whether he is or is not a compensated surety and whether or not he had the expectation of incidental and indirect benefits from the contract."

Now, principally, it is our position that the condition of the bond has been satisfied. The case went up on appeal and was dismissed. The dismissal was certainly not equivalent to an affirmative answer in any way, shape or form.

The Court: Nor, was it a reversal, either.

Mr. Thorsness: I understand that, your Honor. No, the Court found, inferentially at least, by not finding any damages, that no damages had accrued to the Plaintiff by virtue of the appeal. Therefore, it sent the matter back down to be further disposed of, providing for a new appeal. Now, it's our position that that bond entered into some two

years ago with those sureties, contemplating, as they did, the ability of the principal to pay off the judgment, if on appeal that judgment should be affirmed. I submit that those sureties at that time were required, as a matter of law, of a varied degree, to look to the ability of the principal in signing the supersedeas bonds as sureties. I submit, [61] further, that at this time, at this late date, there has been a material change, a very material change in the ability of the Defendant here to pay off that judgment, if it is affirmed on appeal——

The Court: Counsel——

Mr. Thorsness (Continuing): ——and by reason thereof——

The Court: Pardon me, please. I can't consider that as a meritorious argument because if that were the case, then any time a person appealed and they went bankrupt or were not able to respond, then the fellow says, "Well, I'm sorry; I didn't intend that the guy was going to go bankrupt in the meantime".

Mr. Thorsness: No, your Honor, that is not the case we have here, I believe. Certainly, I will concede that on an ordinary appeal and supersedeas bonds and principal, if it goes bankrupt, well, of course, in that particular instance that is what the supersedeas is for, but here, we don't have that situation. We have the situation where a bond is being continued, continued beyond the scope of its operation as contemplated by the sureties. It is not the case where it goes up on appeal and affirmed and then the principal turns out to be in-

solvent. By the Court's order the bond has been continued to cover this new appeal. It has been continued to cover the new appeal without the consent of the sureties. In effect, it has extended the coverage of this bond and intervening events have increased the risk. Now, it is a fundamental law of suretyship that an extension of the risk, an [62] increase of the risk without the consent, any conduct of the principal or of the creditor which substantially increases the risk involved in the promise of the surety will release that surety.

Now, to support that position. I would cite two cases. *Southwestern Surety, an Insurance Company vs. Terry*, 185 *Southwestern*, 54, at page 56. Now, in this case, there was a building contract and there was a change made as to the materials that went into that building. The Court found there, that that change was a material variance as to the risk contemplated by the surety and, accordingly, the surety was discharged. In other words, the surety promised to do one thing and now they can't come along and say, "Well, you also promised to do something additional", which he didn't promise to do.

The Court: May I interrupt you, please? What is the incurred additional risk at this time?

Mr. Thorsness: The incurred additional risk—it is inability to pay the judgment if affirmed.

The Court: That took place though, did it not, counsel, after the bond had been signed and isn't that one of the risks that a bondsman takes at any time?



Mr. Thorsness: No, your Honor, I don't believe so. As to that one particular bond, as to that one particular bond, not considering the question of continuance, that is correct, but here, we have the additional question of continuance and the [63] Court must look to the bond to determine the intent of the parties whether or not this bond was intended to be a continuing bond to cover the obligations as they accrue. Now, the situation that your Honor speaks of is the usual situation where there is no question of continuing the obligation of the surety. Here, by the order of the Court, the obligation of the surety has been broadened and extended to cover not only the first appeal, but the new appeal which now may be prosecuted, and it is for that reason that we contend that the risk is material; it comes into play. Certainly, had there been no question of continuance, then that risk was a risk that the surety took, but the surety now is required to continue to assume that risk until the appeal is taken, and I submit, that the facts have materially changed and a continuance thereof would in effect, run contrary to the intention of the parties to the bond and run contrary to the promise of the surety. Now, the promise of the surety in these cases in that appeal, the first appeal, was to pay the judgment, if affirmed, or if dismissed. Now, the Plaintiff may make quite a point of dismissed for any reason. I submit that although this bond may be subject to a strict construction, that that rule is a rule of construction only and for that general rule, I would cite the

case of *State vs. Blanchard Construction*, 136 Pacific, 905. Now, I think without a doubt, by reading the bond, it is obvious from a cursory examination of that bond that the principal and surety were to [64] pay, or rather, the surety was to pay if they did not accomplish what they intended to accomplish by the appeal; in other words, if the right of the Plaintiff was, in effect, affirmed by the Appellate Court. Certainly, that was not done here. If anything was done here, the direct opposite occurred. The Plaintiff was required to come back to the Trial Court and perfect his judgment prior to the time he was even allowed to appeal. Certainly, he acquired no rights by that, by the appeal. Certainly, he didn't even maintain what he thought he had when he started.

The Court: Let me ask you, counsel, do you think the bondsmen took the fact into consideration that the judgment had not been signed at the time that they went on the bond?

Mr. Thorsness: Well——

The Court: Isn't it a fact they never even thought about it, didn't even know about it?

Mr. Thorsness: That's very possible.

The Court: So, therefore, you can't say that that was a condition that was broken.

Mr. Thorsness: The condition that was broken as far as I see it was the continuance of that obligation. Had the Court affirmed on appeal, then the bondsmen would have been subject to pay the judgment as affirmed. Now, the fact that they didn't take that into consideration, I don't think

is material. The important question as I see it here, is that their promise limited to one appeal is now being extended to a second appeal under [65] circumstances which in all probability——

The Court: It was only technical at the most.

Mr. Thorsness: I think it's a little bit more than technical, your Honor, because as your Honor well knows, the circumstances of the principal here have changed materially. Now, by virtue of that fact, the sureties wouldn't in all probability be required to pay without much question. Now, before, when they promised before at the first appeal, I think there existed at that time a possibility that the principal could pay off and that they wouldn't have to pay. I think your Honor in effect, is making them an insurer, an insurer of the ability of the principal to pay, and continuing their promise beyond the natural scope of its import. I think one additional matter should be stated and that is that the principal here, is now in receivership and, accordingly, the Plaintiff here could not execute against that principal to recover the amount of his judgment, if affirmed. Therefore, it pleases the sureties in an extremely dangerous position; certainly, not a position that a surety would enter into voluntarily. It puts him in the position of substituting himself for the principal, in effect. It puts him in the position of assuming the obligation, assuming the obligation of a judgment of record; true, possibly going on appeal to be reversed, but only possibly. In the usual instance, the surety promises to pay, if the principal doesn't pay, but

in the usual instance, the principal is at least in some position where he might be able to pay. [66] Now, here, that is not the case. If judgment is affirmed on appeal, the sureties are automatically subject to execution or subject to judgment on their supersedeas bond. Now, I'd like to just add, and reiterate, what has been said before, quoting from the words of the opinion of the Circuit Court in this case when it was sent back down for further action, and that is that the Circuit Court said this, and I think it's material to deciding this question of whether or not, by the continuance of this bond, there is an extension of the sureties' risk beyond which he voluntarily assumed in the light of the material variation of the ability of the principal to pay, and the language, the pertinent language is this: that the case will belong absolutely to the next trial judge who picks it up. If he should desire to enter appropriate judgment, complying with Rule 54 (b), and denying a new trial, a single new appeal could be made herein and this Court has power to order the use of the previously printed record.

Now, if your Honor please, my position is that by the Court's ruling in effect, I submit that the bonds continue; the Court subjects the sureties to a risk far beyond the risk which they voluntarily assumed in executing the supersedeas bond for the first appeal.

The Court: Very well; Mr. Kay.

Mr. Kay: I will be very brief, your Honor, because I feel there is nothing before the Court. I

feel that, in effect, the—counsel have just argued, or they're asking the Court for [67] declaratory judgment here on supersedeas bonds, as to whether or not they continue or not. That question isn't before the Court and won't be until they file a notice of appeal. If they intend to do so it may not be before the Court, this Court, at this time, and if they don't raise the question, it won't be before any court and we don't intend to raise the question until we get it before the Ninth Circuit Court and it won't be before them; if they win in the Ninth Circuit Court that will dispose of it. It's only in the event they do appeal and if we lose, or, we win, that the question will then become important and will then be decided; at least it's not before the Court now. They're asking for a declaratory judgment. They seem to make—attach some importance to the fact that the Circuit Court of Appeals didn't allow costs. Well, the question of costs on this thing was not considered by the Court and not referred to by the Court, as I read their opinion. They didn't pass on that question at all, which is an indication to me, your Honor, if they had considered that their opinion finally disposed of this appeal, they'd have considered the question of costs. I think they knew, and we knew, all of us knew, that their opinion was a purely technical step because failure to comply with the provisions of Rule 54 (b), and they knew very well that their opinion in no way finally disposed of this case. If they had finally disposed of the case, they would have at least mentioned whether or not they allowed

costs or not, which they didn't even mention. Now, Mr. Thorsness—the Court in its [68] question pointed out he attempts to argue that the condition of the principal should have some effect here. If this Court considered the condition of the question at all, I think that would be a very strong argument in our behalf because we withheld to what in effect their argument is; we withheld argument; withheld execution at a time we had it in the hands of the marshal; we withheld execution, your Honor, by order of the then judge, Trial Judge of this Court presiding over that case, at their request to enable them to file this supersedeas bond when that execution was in the hands of the marshal. It had been, in fact, levied upon their bank account, and the magnificent sum of \$14.00 had been obtained by levy. A continuing levy was threatened to the following day. They went to the Judge, not we went to the Judge, they went to the Judge and said “stop this execution,” and the Judge ordered us to withhold our execution until the following Tuesday, pending their filing a proper bond. They did not then raise any question concerning the finality of the judgment whatsoever. They came in and filed this bond. They voluntarily entered into this contract with the Court and with us that, “if you will withhold that execution \* \* \*”—and I don't care whether the execution was valid or not; it was effective and the Court viewed it as effective and the Court prevented us from going ahead on it in view of their willingness to execute this bond; so, if there's been any change in the condition of the

principal, it's been to our detriment and it's been—we're the ones that should be making that argument [69] because we have yielded the position that we were in, according to them, the strong position that we were in, the possibility of collecting this judgment from the principal. We have been—we have not only yielded it, but have been forced to yield by the Court and then bound by their filing this bond, and I can't see that argument in any way, except to our benefit. As a matter of fact, the intention of the sureties when they signed this bond was as they recited in the bond itself—"The condition of this bond is that if the judgment in full herein \* \* \*"

Now, the judgment which you Honor signed yesterday is the "judgment herein." It's true that it was only signed yesterday and the bond was signed sometime ago, but at that time there was a judgment identical with the judgment that your Honor signed yesterday except for the language required by Rule 54 (b). That judgment is identical word for word with the judgment at that time and there isn't—in other words, we can't pick this thing to pieces and say there was no judgment or this is a new appeal. I don't care if those words are used or not. They aren't—as a matter of fact, everything in the Circuit Court opinion, that first page is dictum. They sent it back for failure to comply with Rule 54 (b). All of the rest of the discussion was just conversation. That's what they did, dismiss the opinion because of failure to comply with Rule 54 (b). It wasn't ours, it was theirs and I

say that the Court is not required at this time to say whether or not these bonds continued. The Court has said [70] that they will not be exonerated. The Court has said that they will not permit judgment on them at this time. I say that there is no—any attempt to ask the Court to declare whether or not they're in effect or not is an attempt to obtain the declaratory judgment from the Court and not permitted at this time.

Mr. Renfrew: Your Honor, may I make one slight observance?

The Court: Yes.

Mr. Renfrew: Counsel has stated that there was no question as to the finality of the original judgment and that the defendants in this action never raised such a question. I don't concur in that statement at all. I want to point out to the Court that a motion was filed requesting the Trial Judge to comply with Rule 54 (b) and that the Trial Judge denied that motion. In other words, the Defendants in this action requested the Trial Court to comply with the very rule which would have, if he would have complied, made a valid judgment.

The Court: Well, that was on the original trial.

Mr. Renfrew: That was after the trial.

The Court: But then it was on original proceedings not before this Court.

Mr. Renfrew: I think everything is before this Court.

The Court: Well, excepting this: that was determined by the Honorable George W. Folta and was not called to this Court's attention.



Mr. Renfrew: I understand that, your Honor, but counsel [71] made the statement that we had never questioned the finality of that.

Mr. Kay: If I made such a statement I didn't mean to make it.

Mr. Renfrew: Well, it's in the record whether he made it or not.

Mr. Kay: He did file and it was denied a long time before this proceedings that I refer to occurred.

Mr. Renfrew: May I complete my argument, counsel?

Mr. Kay: Not if you are going to misquote me.

Mr. Renfrew: I will submit to the record, your Honor, as to what counsel said.

The Court: Well, you may proceed, Mr. Renfrew.

Mr. Renfrew: Now, your Honor, when the Trial Court refused to comply with our request, that he comply with Rule 54 (c), or (b), and did place the judgment of record, we had to file supersedeas bonds to stay that execution on that judgment although we had done everything that we could do to get the Trial Court to make that judgment a valid judgment. We couldn't just sit back and not file supersedeas bonds because they had gone ahead and levied an execution and the question would have been moot, so we did file the supersedeas bonds and counsel has already argued to you our position as to what those bonds are. Now, Mr. Kay made one other statement. He said we can't pick and say that—pick this thing up piecemeal and pick it apart and say [72] no judgment—that the Ninth

Circuit Court, or that there was not judgment. Well, maybe we can't, your Honor, but that is the very language that the Circuit Court used in their opinion and I quote: "It is obvious that there is no final judgment here on the Thomas and Frazier claims. The essential finding that there is no reason for delay being absent." There is no final judgment; it's obvious, they said, and they went on to say that the verdicts were there without any judgment and I submit that the Defendants in this action did everything they could possibly do to make a correct judgment by making a motion that the Court that tried the case comply with the rule, which motion was denied and I don't think we can be penalized for that.

The Court: Very well. Well, decision will be reserved.

Mr. Arnell: Your Honor, may the record——

The Court: Just a moment, please, the Court will strike the record on that point. The Court does not intend to reserve decision, but the Court will consider argument and then determine whether or not a further decision should be made in this case.

Mr. Renfrew: I will ask the Court to please notify counsel whatever your decision is.

The Court: The Court will be glad to do that. Now, Mr. Arnell.

Mr. Arnell: May the record show, your Honor, that I—while I didn't appear formally because of the fact that your Honor had ruled on the motion for judgment which was filed by the [73] Plaintiffs;

that I did appear and that your Honor directed my attention to Rule 44, that I reserve the right on behalf of the people whom I represent to come in at a later date in an attempt to file a petition or motion, whatever is required there for leave to intervene to protect the interest of the people whom I represent.

The Court: Now, that—pardon me, please. I had in mind that that would be on appeal, only, and not before this Court because we can't piecemeal it.

Mr. Arnell: Your Honor, this matter still is piecemeal before the Court. The judgment was signed yesterday; there has been no appeal.

The Court: Excepting this, counsel, surely you don't expect this Court to permit you to come in later, the day after tomorrow, or next week and argue virtually the same thing that's been argued today that was set down for hearing at 2:00 o'clock today. We don't have the time; we can't do it, Mr. Arnell.

Mr. Arnell: I think, your Honor, that I have the obligation as an officer of the Court and also the right to file these papers; whether your Honor wants to consider them, or, hearing any other argument, that's another point.

The Court: In that respect, the Court's granted you the right to file papers and I suggested how it should be done to protect your—the interest of your litigants.

Mr. Arnell: Yes. [74]

The Court: But, I wouldn't want you to get the impression that the Court is going to permit

you to come in at some subsequent time and go into the matter again because we don't have the time to go over the same ground.

Mr. Arnell: I realize that, your Honor. However, I wish to have whatever papers I could file presented to your Honor before this ten day period expires since the judgment was signed yesterday; I realize that, until I get it in court this afternoon——

The Court: Very well. Is there anything else to come before the Court at this time?

Mr. Renfrew: May I ask the Court if the judgment that was signed was the copy of the judgment, proposed judgment, furnished us here several months ago?

The Court: Yes, upon which Mr. Hellenthal specifically noted a sentence to the effect that he wished to be heard in oral argument; if I am not mistaken, it was sometime in December of 1955.

Mr. Kay: Right after the opinion was heard.

The Court: Yes. This court will go into recess until the call of the gavel. [75]

Anchorage, Alaska, May 23, 1956

10:15 o'clock a.m.

The Court: In the case of Dorothy Neal, et al, Plaintiffs, vs. Matanuska Valley Lines, Inc., et al., Defendants, A-8214 and the allied cases of A-8666 and A-8413, the ruling was made by this Court the day before yesterday on the motions herein contained. At the request of counsel yesterday, the Court permitted counsel to argue certain points

and phases of the case although the Court had ruled previously and also, the Court did permit counsel to file a reply brief to the briefs presently in the file which had been considered by the Court in detail and for a long period of time before making the ruling.

After consideration of all of the argument, as well as the reply brief, the Court at this time announces that the decision heretofore made shall stand. A minute order may be entered accordingly and as requested by counsel, would the clerk at her convenience, please notify all counsel?

Deputy Clerk: Yes, sir. [77]

\* \* \* \* \*

[Endorsed]: Filed Aug. 14, 1956.

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[Endorsed]: Nos. 15252, 15253, 15254. United States Court of Appeals for the Ninth Circuit. Matanuska Valley Lines, Inc., a Corporation, Appellant, vs. Dorothy Neal and Nathaniel Neal, Jr., Blanche Thomas, Wordie Frazier and Prince Frazier, Appellees. Transcript of Record. Appeals from the District Court for the District of Alaska, Third Division.

Filed: September 4, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.



**Nos. 15,252, 15,253, 15,254**  
**United States Court of Appeals**  
**For the Ninth Circuit**

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MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation, LEWIS E. SIMPSON, LOUIS  
ODSATHER, J. A. COLUMBUS, H. N. BAKER,  
RUSSELL SWANK and NORMAN G. LANGE,

*Appellants,*

vs.

DOROTHY NEAL and NATHANIEL NEAL, JR.,

*Appellees.*

No. 15,252

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation,

*Appellants,*

vs.

BLANCHE THOMAS,

*Appellee.*

No. 15,253

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation,

*Appellants,*

vs.

WORDIE FRAZIER and PRINCE FRAZIER,

*Appellees.*

No. 15,254

**On Appeal from the United States District Court,  
for the District of Alaska, Third Division.**

**BRIEF FOR APPELLANTS.**

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FILED

MAR - 7 1957

PAUL P. O'BRIEN, CLERK





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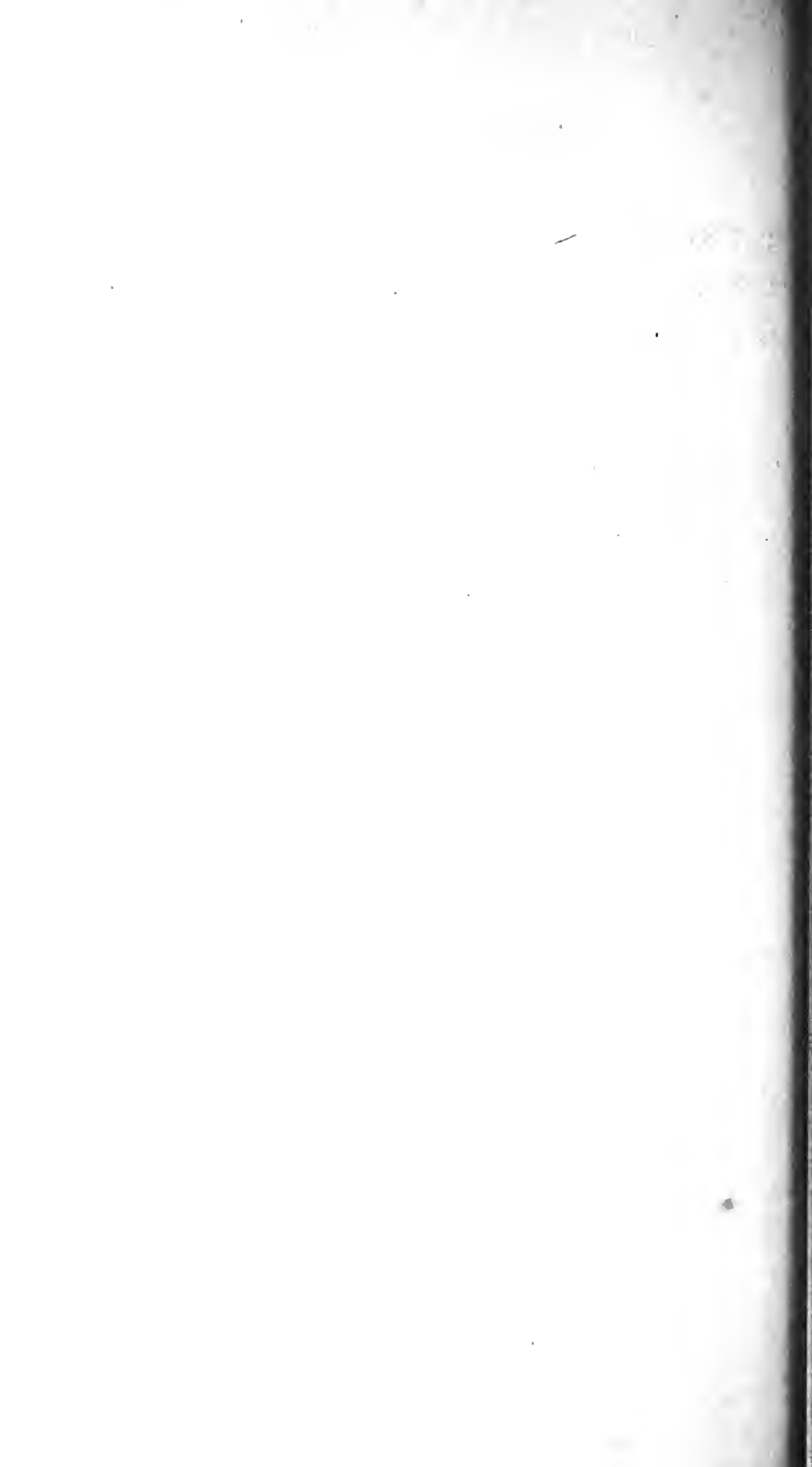
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Nos. 15,252, 15,253, 15,254.

## United States Court of Appeals For the Ninth Circuit

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MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation, LEWIS E. SIMPSON, LOUIS  
ODSATHER, J. A. COLUMBUS. H. N. BAKER,  
RUSSELL SWANK and NORMAN G. LANGE,

vs.

*Appellants,*

No. 15,252

DOROTHY NEAL and NATHANIEL NEAL, JR.,

*Appellees.*

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation,

vs.

*Appellants,*

No. 15,253

BLANCHE THOMAS,

*Appellee.*

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation,

vs.

*Appellants,*

No. 15,254

WORDIE FRAZIER and PRINCE FRAZIER,

*Appellees.*

On Appeal from the United States District Court,  
for the District of Alaska, Third Division.

### BRIEF FOR APPELLANTS.

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#### I.

#### PLEADINGS AND JURISDICTION.

The civil causes herein dealt with, being A-8214,  
A-8413 and A-8666 in the District Court for the Dis-

trict of Alaska, Third Division, were previously presented to this Court on appeal by briefs and by oral argument. During oral argument a question arose concerning compliance with Rule 54(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., and accordingly, the appeal was dismissed for the failure of the trial Court to comply with Rule 54(b). That appeal was designated docket numbers 14529, 14530 and 14531 and will hereinafter be referred to as the former or old appeal. This Court has allowed the briefs filed and the printed record filed in the old appeal to be used herein (R 32, 51, 66). Accordingly the appellants adopt the appellants' opening brief in the old appeal and make it a part hereof as if the same appeared in full herein. Subsequent to the issuance of this Court's mandate in the old appeal (R 3, 34, 53) and this Court's opinion filed December 13, 1955, such opinion appearing at 229 Fed. (2d) 136 in which this Court stated: "... The verdicts now stand with no judgment . . .", the appellants filed a motion to set aside the verdict and in the alternative for a new trial (R 7, 38) a motion to discharge bond and exonerate bond sureties (R 9, 37) a motion for new trial (R 19) and a motion to set bond on appeal (R 22).

The jurisdiction of the District Court for the District of Alaska rests on the Act of June 6, 1900, 31 Stat. 322 as amended, 48 U.S.C. 101. The jurisdiction of this Honorable Court emanates from 28 U.S.C. 1291 and 28 U.S.C. 1294.

## II.

**STATEMENT OF CASE.**

The subject matter of this supplemental brief had its inception in the verdicts returned by the jury in civil causes A-8214, A-8413 and A-8666 in the District Court for the District of Alaska, Third Division. The verdicts are set forth in the final judgment which was signed the 21st day of May, 1956 (R 14). The jury by its verdicts failed to return a verdict concerning a cross-claim between the defendants Matanuska Valley Lines, Inc., and Louis Williams. Subsequent to the return of the verdicts in each of the causes then pending before the District Court, the appellant moved for a revision of the judgment which was signed the 12th day of October, 1953, and entered on the 14th day of October, 1953 (R docket No. 14531, page 17; R 14530, page 15; R 14529, page 19). The judgment of which revision was sought appears in the record of the old appeal, 14529, page 15; 14530, page 11; 14531, page 13. This motion was subsequently denied by the trial Court and the appeal was taken, resulting in the dismissal by this Court and the issuance of its mandate which provides in part:

“ . . . On consideration whereof, it is now here ordered and adjudged by this court, that the appeal in this cause be, and hereby is, dismissed. (December 13, 1955 . . . )”

“ You, therefore, are hereby commanded that such proceedings be had in said cause in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding” (R 3, 34, 53).

This Court's opinion referred to in its mandate in the old appeal, filed December 13, 1955, and appearing at 229 Fed. (2d) 136, recites that:

“ . . . The separate appeals will be dismissed . . . ”

The opinion of this Honorable Court also recites that:

“ . . . The verdicts now stand with no judgment. A transcript has been made. The case will belong absolutely to the next trial judge who picks it up. If he should desire to enter an appropriate judgment, complying with Rule 54(b) and denying new trial, a single new appeal could be made herein and this court has power to order the use of the previously printed record . . . ”

Subsequent to the spreading of the mandate on the records of the District Court for the District of Alaska, Third Division, the appellant filed a motion to set aside the verdicts or in the alternative for a new trial (R 7, 38). Simultaneously, the appellant filed its motion to discharge bond and exonerate bond sureties (R 9, 37). By minute order the Court denied both of appellant's motions (R 11, 55). Appellees filed their motion for judgment on supersedeas bonds (R 10, 40, 10) which was also denied by the Court in its minute order (R 11, 11, 55). Briefs were submitted in support of appellant's motion to discharge bond and exonerate bond sureties and in opposition to appellees' motion for judgment on supersedeas bonds. Extensive argument was had on such motions and the Court ruled, denying both motions as here-



tofore indicated. Appellant's motion to discharge bond and exonerate bond sureties was based upon the contention that (1) there was no judgment to supersede, and (2) that the opinion of the United States Court of Appeals for the Ninth Circuit, filed December 13, 1955, does not require the payment of costs.

The invalidity of the judgment was called to the attention of the trial Court in the course of argument (R 86, 87, 89). The attention of the trial Court was also directed to the fact that by the denial of appellant's motion to discharge bond and exonerate bond sureties, it was in effect continuing the bonds filed in the old appeal over into this present appeal, and accordingly, was contrary to the intent and scope of the bonds' provisions. This question was considered by the Court (R 80, 82) and raised by counsel (R 83, 100, 102, 103). These matters were fully briefed by counsel for both parties and presented to the Court, such briefs not being a part of this record for the sake of brevity.

Appellees' motion to enter final judgment was granted by the Court's minute order dated May 21, 1956 (R 11, 11, 55) and its order and certificate was issued (R 12), and the final judgment from which appeal is now taken was signed on the 21st day of May, 1956 (R 17). Subsequent to the signing of the new judgment, the appellant moved for a new trial (R 19) which was denied on the 1st day of June, 1956 (R 20, 42, 57). Subsequent thereto the appellant moved to set bond on appeal (R 22) and such motion was likewise denied on July 20, 1956 (R 25,

46, 60). Thereafter, the appellant Matanuska Valley Lines, Inc., together with its sureties on the various supersedeas bonds, noticed appeal to the Court of Appeals for the Ninth Circuit (R 21, 43, 58). The sureties are such on the supersedeas bonds filed of record herein and as such, have submitted themselves to the jurisdiction of the District Court when their liability may be established simply on motion pursuant to Rule 73(f) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

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### III.

#### **SPECIFICATIONS OF ERROR.**

1. That the trial Court erred in denying the motion of Matanuska Valley Lines, Inc., for an order discharging bond and exonerating bond sureties.
2. That the trial Court erred in denying the motion of Matanuska Valley Lines, Inc., to set bond on appeal.
3. That the trial Court erred in continuing the cost and supersedeas bonds filed in the former appeal, docket numbers 15252 and 15253 in force and effect in this appeal.
4. That the trial Court erred in denying appellant's motion for new trial.

## IV.

**ARGUMENT.****A. DENIAL OF APPELLANT'S MOTION FOR AN ORDER DISCHARGING BOND AND EXONERATING BOND SURETIES.**

Subsequent to the issuance of this Court's mandate (R 3, 34, 53) and the filing of its opinion appearing at 229 Fed. (2d) 136, the appellant Matanuska Valley Lines, Inc., filed its motion in civil cause numbers A-8214 and A-8413, former docket numbers 14529, 14530, and docket numbers 15252 and 15353 herein, for an order of the trial Court discharging the cost and supersedeas bonds filed in the former appeal and to exonerate bond sureties on such bonds. The principal ground for appellant's motion was that there was no valid judgment to supersede in the former appeal (R 86, 87, 89) and that the bonds as given were given for costs in the former appeal and to supersede the effect of the invalid judgment. As found by this Court in its opinion filed December 13, 1955, cited above, the judgment in the former appeal was fatally defective in that it did not comply with Rule 54(b) of the *Federal Rules of Civil Procedure*, Title 28 U.S.C.A. for the reason that it failed to dispose of all claims before the trial Court, and in particular, a cross-claim between the co-defendants; and further, that it did not contain an express determination that there was no just reason for delay in the entry of final judgment on the verdicts and also failed to contain an express order that such judgment should be entered. The purported judgment as such was entered by the Clerk without any direction, and appellants

submit that such entry was without force and effect in that Rule 54(b) requires that: “. . . The Court may direct the entry of a final judgment upon one or more and less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . .”

Rule 58 of the *Federal Rules of Civil Procedure*, 28 U.S.C.A., entitled “Entry of Judgment,” states:

“Unless the court otherwise directs *and subject to the provisions of Rule 54(b)*, judgment upon the verdict of the jury shall be entered forthwith by the clerk.” (Emphasis supplied.)

Accordingly, it is clear that the Clerk had no authority to enter the judgment as was done in that such entry must be made subject to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure and, accordingly, it must follow that the entry therefor was null and void and of no force and effect.

Further, this Honorable Court in its opinion and mandate, dismissed the appeal, former docket numbers 14529, 14530 and 14531, for the failure of the trial Court to comply with Rule 54(b), and stated in its opinion filed December 13, 1955, that:

“. . . The verdicts now stand with no judgment. . . .”

Also, this Honorable Court stated that a single new appeal could be made. Appellants submit that the dismissal of the appeal on jurisdictional grounds, in that 28 U.S.C. 1291 gives this Court jurisdiction only

to hear on appeal from the District Court for the District of Alaska on final judgments, terminated that appeal and voided the purported judgment therein appealed from. Accordingly, any bonds, be they cost or supersedeas, filed by the appellants in the former appeal are also void and of no further force and effect. A similar set of circumstances presented itself to the Supreme Court, Appellate Term, of the State of New York, in the case of *Gelder v. Maryland Surety Co.* (1912, Supreme Court Appellate Term, 137 N.Y.S. 716, wherein the Court had the following to say:

“This case grew out of an appeal on order granting a judgment on a supersedeas bond. The bond was posted to stay of execution on a judgment acquired by the plaintiff. It was appealed and his motion was granted on appeal. The terms of the bond are as follows: ‘If the appeal is dismissed the appellant will pay the sum recovered or directed to be paid by the judgment.’ The Court on appeal had the following to say: ‘Here the action of the Appellate Court in setting aside the verdict and ordering a new trial necessarily extinguished the judgment. It may be the record of the judgment still remained as record uncanceled, but the judgment itself was without any vitality. The effect of the order of the Appellate Division ordering a new trial was very clearly stated in the opinion of the Court wherein it is said: ‘By the order of this Court setting aside the verdict herein and ordering a new trial, the foundation of the judgment was taken away. The issues read by the pleadings are now undisposed of and until such issues are tried and determined,

there can be no judgment in the action.' 135 N.Y.S. 406.

The evident purpose and intent of the undertaking was that if the defendant (the principal) was required to pay the judgment, or if principal had exhausted all legal efforts to overthrow the judgment, that the defendant as surety would then pay the amount specified in the undertaking. If the defendant's principal was not liable on the judgment, it necessarily follows that the defendant should not be held liable upon its obligation of suretyship. The intent of the parties to the contract of suretyship was that the defendant should not be liable unless the liability of its principal was established. The action of the Appellate Division in setting aside the verdict and ordering a new trial destroyed the foundation upon which the judgment rested, and left the question of liability of the principal of this defendant (surety) still open for determination. To construe the contract of suretyship to mean that the surety is liable without regard to the liability of its principal is to give it a meaning contrary to its obvious purpose, and to foster upon this defendant a liability which the parties to this contract never contemplated that it should incur. Such a construction is not only highly unreasonable, but extremely unjust. When viewed in the light of these general principles, this case seems so clear that appeal to authority is hardly necessary."

Again, in the case of *Ressler v. Fidelity & Deposit Company of Maryland*, 161 N.Y.S. 417, in which case the Code of Civil Procedure, Section 1345, re-

lating to appeals to the Supreme Court from inferior Courts, declared that a judgment or order of the Appellate Division rendered upon an appeal authorized must be entered in the office of the Clerk of the Appellate Division. A judgment of the County Court was by the Appellate Division modified and affirmed, an order being entered in the office of the Clerk accordingly, whereupon an order was entered in the County Court. A bond for appeal to the Court of Appeals was conditioned that if the judgment appealed from was affirmed, or the appeal dismissed, the appellant would pay the sum recovered or directed to be paid by the judgment. The appeal was dismissed on the ground that the appeal was taken from an order of the Appellate Division and not a judgment. The Court held in that case that no recovery could be had on the bond, for the act was not complied with and there was no judgment from which an appeal would lie or which appellant need satisfy in accordance with the judgment. Thus, in the case at bar, there being no valid judgment, there can be no liability on the cost and supersedeas bonds.

In the case of *Regiera v. U.S.F. & G. Co.*, 136 N.Y.S. 42, Supreme Court Appellate Term, a judgment was taken by default and an appeal was subsequently taken and undertaking was given containing a statement that if the judgment was affirmed, or the appeal dismissed, the defendant would pay the same. The appeal was dismissed and the defendant moved in the trial Court to set aside the default. This was denied by the trial Court but on appeal, the default

judgment was vacated. In this case, the question before the Court was an action on the undertaking. The Court denied any relief under the bond to the plaintiff, stating that:

“The vacation of the judgment relieved the defendant from any liability under the undertaking and this action cannot be maintained.”

Likewise, in the case of *Jones v. Costa* (Municipal Court of Appeals for the District of Columbia), 94 A. (2d) 651, where the defendant filed a supersedeas bond prior to filing his notice of appeal and subsequent thereto, the plaintiff moved to assess damages under the defendant's supersedeas bond, the defendant, having made no further attempt to prosecute his appeal, the Court had the following to say with regard to the supersedeas bond filed prior to the notice of appeal:

“The authority for filing the supersedeas bond was Municipal Court Rule 60 (now Municipal Court Rule 71 patterned after Federal Rules of Civil Procedure, Rule 73, 28 USCA) which rule provides: ‘Whenever an appellant desires a stay on appeal he may within ten days from the date of entry in the civil docket of the judgment or order appealed from, present to the court for its approval a supersedeas bond, which shall have such surety or sureties as the court requires.’ It will be observed that the rule permits ‘appellant’ to file such bond. We think this is a clear indication that a supersedeas bond cannot be filed or at least cannot become effective, until the party filing it has also filed notice of appeal. This is made plain by the Federal Rules of Civil Pro-



cedure, Rule 62(d) which provides: ‘When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.’ ”

Further, at page 53 of the Court’s opinion, the following appears:

“It seems apparent that the rule of the trial court permits the giving of a supersedeas bond only by one who has taken the final jurisdictional step towards prosecuting an appeal by filing notice of appeal.”

The Court also stated that:

“In the absence of notice of appeal, it is our conclusion that the bond never became effective as a statutory obligation and no liability existed thereon.”

Accordingly, the Federal Rules allow the filing of a supersedeas bond to obtain a stay only after the jurisdictional requirements have been satisfied, to-wit; filing a notice of appeal. In the case at bar this Court has held it had no jurisdiction to entertain the appeal in that the purported judgment appealed from was not final and in conformance with Rule 54(b) and, accordingly, it had no jurisdiction under Section 1291, Title 28 U.S.C.A. to entertain the appeal. Appellants submit that the failure of this jurisdictional require-

ment nullifies each and every act after the signing of the purported judgment in that such act to-wit; the signing of a valid judgment, is necessary to validate any and all events subsequent thereto. Accordingly, the appellants not only had no right to supersede the invalid judgment, but did not obtain a stay by virtue of posting the supersedeas bond in that the judgment itself was defective and not entitled to execution.

In the case of *R. D. Goldberg Theatre Corp. v. Tri-State Theatre Corp.* (8th Cir.), 119 Fed. Supp. 521, where there was an attempted appeal from a motion for inspection of documents and a supersedeas bond was applied for, the Court had the following to say:

“But, both upon principle and by acknowledged authority, the right to supersede presumes the right to appeal as distinguished from the possession of a meritorious appeal. But where no right to appeal exists there is no right to supersede.”

Accordingly, in the case at bar, due to the fact that there was no valid judgment, no right to supersede existed and, therefore, the bonds filed can have no force and effect and should have been discharged and the sureties thereon exonerated.

Likewise, in the case of *Hampshire Arms Hotel Co. v. St. Paul Mercury & Indemnity Co.*, 9 N.W. (2d) 413, where the plaintiff had recovered a judgment and the defendant noticed appeal, and subsequent thereto the defendant entered judgment, the plaintiff moved to dismiss the appeal as premature on the ground that

no judgment had been entered prior to the noticing of the appeal. The defendant then moved for an order nunc pro tunc changing the date of entry of the judgment, and the trial Court entered an order nunc pro tunc changing the date of judgment. The Appellate Court granted plaintiff's motion to dismiss and held the order nunc pro tunc void. The Appellate Court had the following to say concerning the bond posted by the defendant subsequent to his noticing appeal which occurred prior to his entry of judgment, as follows at page 415:

“The dismissal of the appeal was in effect an adjudication that the appeal, and consequently the bond, was void. The adjudication operates to estop plaintiff from asserting that the bond was valid or that the attempted appeal was consideration for it.”

Likewise, in the case of *Janes v. Kuhn*, 161 S.W. (2d) 778, where two plaintiffs brought an action against four defendants and a jury trial was had resulting in a judgment in favor of three of the defendants with no disposition by verdict or otherwise as to the fourth defendant, and the appeal was sought to be perfected by the plaintiffs to the Court of Civil Appeals, an appeal bond was filed on January 10, 1940, and the appeal was dismissed on March 20, 1941, by the Court of Civil Appeals for the failure of the judgment to dispose of the claim against the fourth defendant. There was no appeal from the ruling of the Court of Civil Appeals of March 20, 1941, dismissing the appeal, and the plaintiffs sought to obtain

judgment in accordance with the verdicts returned and dismissed as to the fourth defendant. Plaintiffs further sought an order nunc pro tunc which order recited that the judgment was entered nunc pro tunc for the purpose of correcting the record this 29th day of March, 1941. No appeal was had after the entry of the second judgment and the new judgment was presented to the Court of Civil Appeals by motion and supplemental transcript to correct the record. The Court of Civil Appeals reinstated the appeal and reversed the judgment and granted a new trial. The Commission of Appeals of Texas granted the writ of error and in its opinion stated as follows:

“It is well settled in this state that when a judgment is pronounced at one term and not entered of record at that term but is entered nunc pro tunc at the succeeding term, the right of appeal from such nunc pro tunc order dates from the entry thereof (citing cases). It is also well settled that an appeal bond filed at a previous term of court, and prior to the entry of a nunc pro tunc order at a subsequent term of court, is premature and ineffective to perfect an appeal from such nunc pro tunc order” (citing cases).

Accordingly, the judgment of the Court of Civil Appeals was reversed and the appeal was dismissed.

Also, in the case of *Pick et al. v. Pick et al.* (Wis.), 15 N.W. (2d) 807, where there was a deposit made to stay execution and for costs, the Court had the following to say with regard to a dismissed appeal:

“When an appeal is dismissed the appeal bond or undertaking or deposit of money in lieu thereof

falls with it. On a second appeal a new undertaking or deposit must be given to perfect it (citing cases). When the first appeal was dismissed on December 7, 1943, and the record returned to the trial court, appellants were in the same position as though no appeal had been taken, so far as perfecting a second appeal."

While appellants will concede that it is not a jurisdictional requirement that the appellants file a supersedeas bond in an appeal to the Court of Appeals, it is their contention that if one is filed on a stay of execution and the appeal is subsequently dismissed for the reason that the so-called judgment appealed from was defective, then the bond staying the execution of that judgment is relieved of any force and effect and should be discharged and the sureties exonerated. Thus, in the case at bar where the cost bonds and the supersedeas bonds were posted pursuant to rule and to obtain a stay of the so-called judgment, though defective, and that appeal was subsequently dismissed and the matter was remanded to the trial Court for the entry of valid judgment in conformance with the rules, appellants contend that the matters accomplished in the first and former appeal had no further force and effect after this Court dismissed the appeal, and that it is as if no appeal had been taken. In order to obtain a stay the appellants are required to comply with the *Federal Rules of Civil Procedure* which provide that the appellant may obtain a stay of execution on appeal by posting a proper supersedeas bond. The language of the

cost and supersedeas bonds filed in the former appeal clearly indicates that the bonds were intended to supersede and stay the execution of the so-called judgment then of record. It is certain that the principal and sureties on such bonds did not contemplate a second and successive appeal, as the only judgment then in existence was the so-called judgment declared to be of no further force and effect and void by this Court, and did not contemplate the judgment subsequently signed herein on the 26th day of May, 1956. As hereinbefore set forth, Rule 58 of the *Federal Rules of Civil Procedure* concerning entry of judgment requires that entry be subject to the provisions of Rule 54(b) with reference to the express direction of the Court for entry. Rule 62 of the *Federal Rules of Civil Procedure* concerning stay of proceedings to enforce a judgment, in sub-paragraph (a) therein, provides that:

“Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after its entry.”

Sub-paragraph (d) of the same rule provides:

“When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule.”

Rule 69 of the *Federal Rules of Civil Procedure* concerning execution and sub-paragraph (a) therein provides that:

“Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.”

Accordingly, in order that the plaintiffs herein might have had a writ of execution issue, the necessity of a valid judgment was requisite under the rules. It is apparent that no such judgment existed prior to the one signed on the 26th day of May, 1956, and, accordingly, execution could not lawfully have issued on the former defective judgment, nor can the fact that the former so-called judgment was in fact entered, impart any validity to it in that it was entered contrary to the *Federal Rules of Civil Procedure* and in disregard of the requirement that entry be made subject to Rule 54(b).

Therefore, the appellants submit that their motion to discharge bond and exonerate bond sureties should have been granted for the reason that there was not in existence a valid and existing judgment upon which a stay could be predicated and a supersedeas bond filed. When the fact was established that the so-called judgment was void and that the verdicts stood with no judgment, the bonds were then relieved of any further force and effect and should have been discharged and the sureties exonerated. The appellees' motion for judgment on the bonds was denied and no cross-appeal has been taken therefrom. Apparently the appellees recognize the fact that the bonds are of no further force and abide by the decision of the trial Court.

**B. DENIAL OF APPELLANT MATANUSKA VALLEY LINES, INC.'S MOTION TO SET BOND ON APPEAL; CONTINUATION OF COST AND SUPERSEDEAS BONDS BY TRIAL COURT.**

Appellants contend by the refusal of the trial Court to discharge bonds and exonerate sureties, to set and establish a supersedeas bond on appeal and by subsequent statements of the Court appearing in the record (R 80, 82), the trial Court in effect has held that the bonds, both cost and supersedeas, filed in the old appeal which was dismissed, are continuing and are in full force and effect in this new appeal to supersede the judgment signed on May 26, 1956, being appealed herein.

Concerning particularly the supersedeas bonds posted in the former appeal, it is apparent that the sureties on some bonds are corporate sureties and compensated sureties (R 27, 48, 62), and on another are individual, non-compensated sureties (R former docket number 14529, p. 27). It is fundamental that the rule concerning a discharge of the surety is different and less stringent with respect to a non-compensated surety than in the case of a compensated surety. It is said that with regard to the former, the rule of *strictissimi juris* applies and the undertaking will be construed as most favorable to the non-compensated surety. With regard to the construction of the undertaking of a compensated surety, the rule of *strictissimi juris* is not applied and the construction given will be liberal and in favor of sustaining the bond and against the discharge of the surety. This, of course, is a rule of construction only, and to be applied only when ambiguity arises. However, appellants contend that



even though the undertaking of a compensated surety is given a more liberal construction, in the case at bar the undertaking of the compensated surety cannot be construed to concern itself with anything other than the purported judgment which was subsequently declared to be void and of no force and effect. Accordingly, the *American Law Institute Restatement of Security*, at Section 128, concerning modification of principal's duty, states as follows:

“Where, without the surety's consent, the principal and the creditor modify their contract otherwise than by extension of time of payment (sub-paragraph a), the surety, other than a compensated surety, is discharged unless the modification is of a sort that can only be beneficial to the surety, and (sub-paragraph b) the compensated surety is (sub-paragraph i) discharged if the modification materially increases his risk and (sub-paragraph ii) not discharged if the risk is not materially increased, but his obligation is reduced to the extent of loss due to the modification.”

The Court in the case of *Crane v. Buckley*, 203 U.S. 441, states that:

“The controlling principle which, in the absence of other considerations, determines the liability of one who executes an appeal bond is, as in the case of other contracts of suretyship, that he is entitled to stand on the express terms of his contract.”

Also it was stated in the case of *Cooper-Mankin Fuel Co. v. Chesapeake & O. R. Company*, 30 Fed. (2d) 500 at 502:

“It is of course true that, while the rule of *strictissimi juris* does not apply to sureties for compensation, these being governed rather by a rule of liberal construction as to liability, . . . nevertheless they are entitled to have their contracts interpreted in full accordance with ordinary legal principles, and their liability is not to be enlarged beyond the scope of the terms of their contract.”

Again in the case of *New Amsterdam Casualty Co. v. Central National Fire Insurance Co.* (8th Cir.), 4 Fed. (2d) 203 at 207, the Court stated:

“It is only when a provision of a bond by a surety or insurance company is ambiguous and subject to two different constructions that it will be construed against the surety company.”

Again in the case of *Pacific County v. Illinois Surety Company*, 234 Fed. 97 at page 98, the Court stated:

“The rule of *strictissimi juris* does not apply to sureties for compensation. This rule was only invoked for the protection of individuals acting gratuitously. Liberal construction of liability against sureties for value is the rule. (citing cases) A surety company for a consideration is, however, entitled to have its contracts interpreted by the ordinary rules of law. (citing cases) And the liability cannot be enlarged beyond the scope of the terms of the contract, and where the language is unambiguous the question of construction does not enter.”

Accordingly, it is submitted that the supersedeas bonds filed in the former appeal could have only been for

the sole purpose of staying the execution of the so-called judgment subsequently declared void. As will appear from the record (R 103) the condition of the principal has changed materially since the filing of the supersedeas bonds. It now appears that the principal is in the hands of a receiver and accordingly, the likelihood of the principal concerning its ability to pay the judgment, if affirmed, is substantially lessened if not altogether removed. Thus, the sureties in executing the supersedeas bond for the stay of the so-called judgment subsequently declared void, did so under the impression that the principal may well be able to satisfy the judgment, if affirmed, out of its assets. However, due to the subsequent change of events, the sureties are now placed in the position of nearly absolute liability in the event that the judgment is affirmed. Thus, it appears that the picture concerning liability has changed materially with regard to the supersedeas bonds and that the continuance of them has constituted a material increase of risk on behalf of both compensated and non-compensated sureties. Therefore, this material increase in risk must result in a discharge of the bonds and an exoneration of the bond sureties, and accordingly the trial Court erred in its ruling in denying appellant's motion to set bond on appeal and in effect, continuing the bonds for the reason that the risk has materially increased subsequent to the execution of the bonds by the various sureties, and as a result, works a discharge of such bonds and an exoneration of such sureties. The sureties executed the supersedeas bonds contemplating one set of circumstances, and subsequent to the dismissal

of the appeal invalidating the so-called judgment, are now faced with almost absolute liability on their bond if the same is to be continued and the only judgment on appeal is affirmed.

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**C. THE TRIAL COURT ERRED IN DENYING APPELLANT MATANUSKA VALLEY LINES, INC.'S MOTION FOR NEW TRIAL.**

This question has been argued in appellant's opening brief, and accordingly, appellants adopt such argument as their argument with regard to this specification of error. Such argument appears in appellant's brief (Br. 7-16).

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**V.**

**CONCLUSION.**

Appellants respectfully submit that the trial Court erred in failing to grant their motion to discharge bond and exonerate sureties for the reason that no valid judgment existed which could be superseded and accordingly, the bonds given to supersede any such judgment are null and void according to the authorities cited by the appellants herein. Further, that the trial Court erred in denying appellants' motion for bond on appeal and in effect, extending the coverage of the supersedeas bonds to the new appeal in that such extension results in the material alteration and the material increase of the risk undertaken by the

sureties to such supersedeas bond, and accordingly, works a discharge of such parties.

Dated, February 28, 1957.

Respectfully submitted,

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**Nos. 15,252, 15,253, 15,254**  
**United States Court of Appeals**  
**For the Ninth Circuit**

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation, LEWIS E. SIMPSON, LOUIS  
ODSATHIER, J. A. COLUMBUS, H. N. BAKER,  
RUSSELL SWANK and NORMAN G. LANGE,  
*Appellants,*

vs.

DOROTHY NEAL and NATHANIEL NEAL, JR.,  
*Appellees.*

No. 15,252

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation,  
*Appellants,*

vs.

BLANCHE THOMAS,  
*Appellee.*

No. 15,253

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation,  
*Appellants,*

vs.

WORDIE FRAZIER and PRINCE FRAZIER,  
*Appellees.*

No. 15,254

**On Appeal from the United States District Court  
for the District of Alaska, Third Division.**

**BRIEF FOR APPELLEES.**

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FILED

APR 18 1957

PAUL P. O'BRIEN, CL





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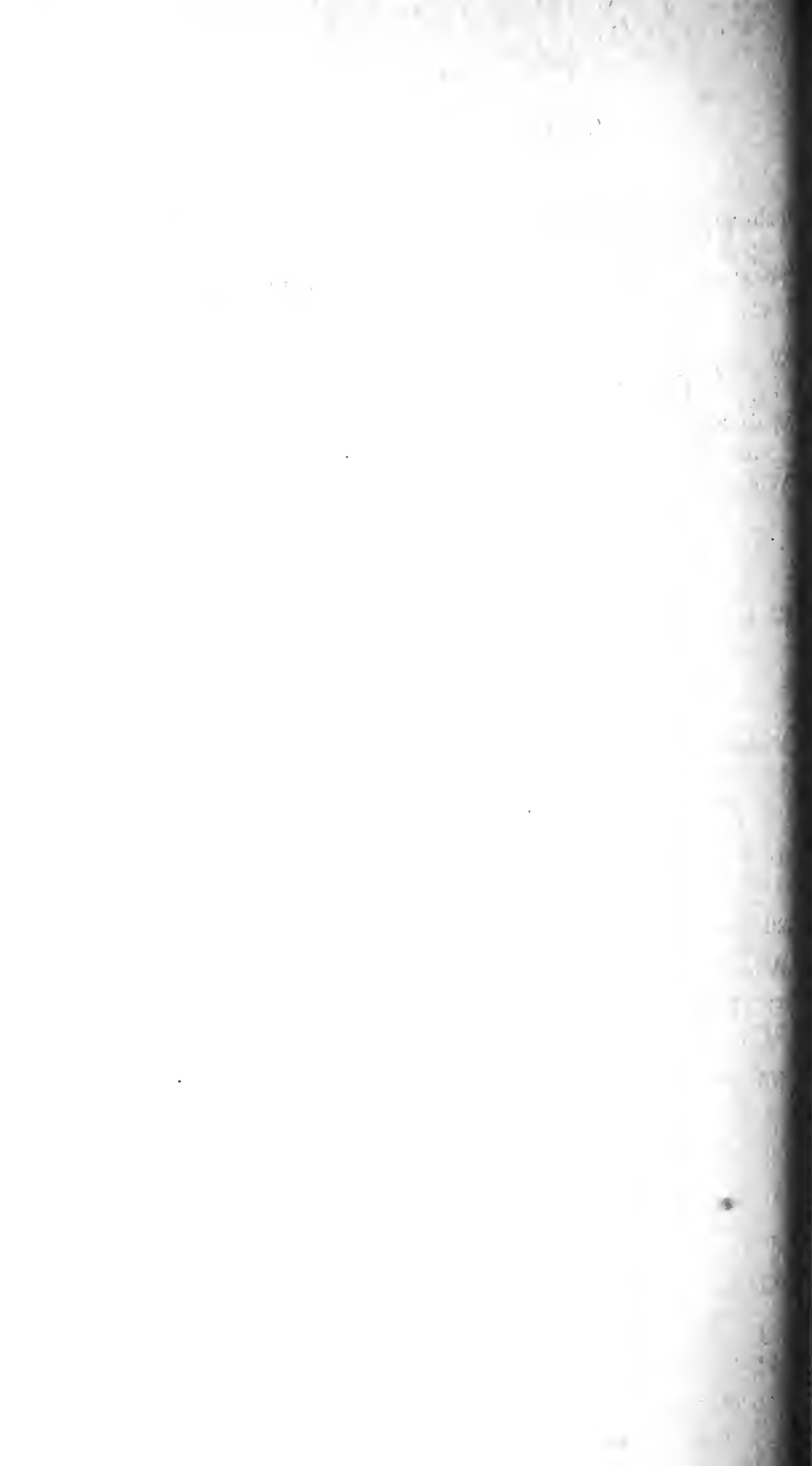
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*Appellees.*

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for the District of Alaska, Third Division.

### BRIEF FOR APPELLEES.

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#### I.

#### JURISDICTION.

The appellees accept generally the jurisdictional statement of the appellants with particular reference to the provisions of 28 U.S.C., Sections 1291 and 1294.

## II.

**STATEMENT OF THE CASE.****The Pleadings.**

Appellees concur generally in the review of the status of the pleadings contained in appellants' most recent brief under the headings "Pleadings and Jurisdiction" and "Statement of Case". (New Br. 1 and 3.)

This litigation arose originally from a collision between a bus and truck on a road near Anchorage, Alaska, November 20, 1951. Three separate actions were filed by fare-paying bus passengers and the spouses of two of them, against the owners and operators of the truck and the bus, alleging personal injuries as a result of negligence. (Old R., Vol. I, p. 3, Nos. 14,529, 14,530, 14,531.) Answers were filed by each defendant, and in two of the cases the bus line cross-claimed against the truck operator for damage to the bus. (Old R. 6-12.) A minute order of consolidation was entered by the District Court. (Old R. 51.)

The consolidated case was reached for trial in September, 1953, and jury verdicts totalling \$101,500.00 were returned on September 24, 1953. (Old R. 12, No. 14,530.) A judgment was signed on October 12, 1953, and filed and entered on October 14, 1953. (Old R. 14, No. 14,531.)

Appellants filed objections to the proposed judgment, motions to set aside the verdicts, for new trial, supplementary motions for new trial, to reduce the amounts of the verdicts, and for revision of the judgment. (Old R. 12, 17-24, No. 14,531.) Only the mo-

tions for new trial were briefed, and although all motions were denied, only the motions for new trial were discussed in the written opinion of the trial court. (Old R. 51.)

Upon argument of the appeal, this Court noted that the judgment as entered did not dispose of the issues presented by the cross-claim. The appeals were dismissed on the ground that the judgment of October 12, 1953, failed to satisfy the provisions of Rule 54(b), Federal Rules of Civil Procedure. 220 F(2d) 136.

On November 2, 1955, the appellees moved for issuance of an order and certificate complying with Rule 54(b). (R. 5.) Appellants filed motions to set aside the verdicts or for new trial, to discharge supersedeas bonds and exonerate sureties, for a new trial, and to set bond on appeal. (R. 7, 9, 19, 22.) Appellees countered by moving for judgment on the supersedeas bonds. (R. 10.) On May 21, 1956, the motions for new trial, for discharge of bond and exoneration of sureties, and for judgment on the bonds were denied, and the motion for entry of judgment granted. (R. 11.) The motions were again disposed of, in the same fashion, after consideration of briefs. (R. 56-7.) The motion to set bond on appeal was denied on July 20, 1956. (R. 25.) An order and certificate under Rule 54(b) and a Final Judgment were signed and entered on May 21, 1956. (R. 12-17.) Notice of appeal was filed on June 20, 1956. (R. 21.)

During argument before the court relative to the various motions, the following additional facts were developed: (1) The defendant-appellant, Matanuska

Valley Lines, Inc., is now insolvent and in the hands of receivers (R. 78); (2) After the entry of the original judgment, plaintiffs caused execution to issue and a levy to be made, whereupon defendants obtained a stay of execution in order to give them time to post supersedeas bonds. (R. 106); (3) Having denied the motions for judgment on the bonds, and to exonerate sureties, the Court took the position that the question of the continuing effectiveness of the supersedeas bonds need not be decided at the time of argument. (R. 82, 84, 85.)

---

### III.

#### **SUMMARY OF ARGUMENT.**

1. The judgment of October 12, 1953, was not appealable under Rule 54(b), but was conclusive of the issues between these parties.

2. Appellants are bound by the terms of the supersedeas bonds; they are estopped from repudiating their responsibility.

3. The trial court did not err in continuing the bonds in effect on this appeal.

4. The motion for new trial was properly denied; the judgment should be affirmed.



## IV.

## ARGUMENT.

1. **THE JUDGMENT OF OCTOBER 12, 1953, WAS NOT APPEALABLE UNDER RULE 54(b), BUT WAS CONCLUSIVE OF THE ISSUES BETWEEN THESE PARTIES.**

We submit that the appellants are mistaken both as to the purpose and effect of Rule 54(b). That rule, as now amended, reads as follows:

“(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims.”

A review of the history of this rule, as found in the advisory committee reports, the proposed amendments, the 1948 amendment, and the many cases interpreting it, leads to the definite conclusion that the rule is intended *only* to effectively prevent unjustified piecemeal appeals, and to give the appellant a means of determining when a judgment or order becomes appealable. None of the text writers or committee reports suggest any intention on the part of

the Supreme Court to modify the effectiveness of orders and judgments in any way, except as to appealability. III Barron and Holtzoff, "Federal Practice and Procedure", pp. 9-19, and cases cited therein; VI, Moore, "Fed. Practice", pp. 1261-1287, and cases cited.

As the Court of Appeals for the Seventh Circuit noted in *Winsor v. Daumit* (CA 7th 1950) 179 F(2d) 475:

"The rule should not be considered as curtailing appellate jurisdiction but rather as one fixing the procedure of the District Court as to conditions of effecting terms upon which an appeal may be taken in the absence of a determination of the entire case. The right to appeal is not negated, but whether an appeal from a piecemeal order must await final disposition is left to the District Courts' decision."

There can be no question but that the failure of the trial court to make the determination and direction required by Rule 54(b) is fatal to the appeal, as this Court held in the present case. However, the appellate courts have demonstrated a uniform desire to facilitate the expeditious handling of a further appeal, should the trial court make such determination, without, however, infringing upon the discretion of the trial court in this regard. As was said in *Lyman v. Remington-Rand Co.* (CA 2d 1951) 188 F(2d) 306,

"Nevertheless, the order is within that rule, as now amended, and is not final in the absence of the certificate of the court for which it provides.

If the appellant provides such a certificate, the order will become final, and he may appeal within 30 days thereafter. In that event, the appeal may be heard upon the present record with only the certificate and new notices of appeal added; and also upon the present briefs, if the parties are so mindful. But upon this record, the present appeal must be dismissed.”

See, also, *Tobin Packing Co., Inc. v. North American Car Corporation, et al* (CA 2d, 1951) 188 F(2d) 158, 159; *Roberts v. American Newspaper Guild, et al* (CA DC, 1951) 181 F(2d) 650, 651; *International Union v. United Electrical R&M Workers* (CA 6th, 1951), 192 F(2d) 847; *Walter W. Johnson Co. v. Reconstruction Finance Corporation*, (CA 9th, 1956), 230 F(2d) 479. The Second Circuit Court has indicated that, under some circumstances, a nunc pro tunc entry of the certificate required by the rule may be made. *Kauffman and Ruder, Inc. v. Cohn and Rosenberger*, (CA 2d 1949), 177 F(2d) 849.

The fact is that the meat of the present case was covered by the jury verdicts which were returned in September, 1953. Only a small claim for property damage between the two defendants was left undecided. Appellants have made no effort during the ensuing years to dispose of this cross-claim, and if it were determined, the outcome would not involve the appellees. All of these circumstances tend to substantiate our conviction that, while the initial judgment was not appealable, it was a conclusive determination of the issues between the appellants

and the appellees by a court of competent jurisdiction, and therefore res adjudicata as to those issues. *Tuolumne Gold Dredging Corporation v. Walter W. Johnson Co.* (DC Cal. 1947) 71 F. Supp. 111.

As Judge Lemmon said in that case:

“Because one phase of the litigation was left unsettled and in that sense the judgment is interlocutory does not preclude the holding that the judgment is res adjudicata as to that phase which has been finally concluded.” (113)

The fact is that the judgment of October 12, 1953, from which appellants appealed and in connection with which the supersedeas bonds were executed, has never been disturbed; it has only been supplemented and made final by the certificate of May 21, 1956. All motions aimed at that judgment have been repeatedly denied. It is conclusive of all issues between these parties unless it is disturbed by this Court on this appeal.

“Where a motion for a new trial has been made and denied, the judgment is deemed to have become final as against further like motions; otherwise there would be no finality to a judgment so long as the losing party desired to attack it by such a motion.” 39 Am Jur, Page 202.

- 
2. APPELLANTS ARE BOUND BY THE TERMS OF THE SUPERSEDEAS BONDS; THEY ARE ESTOPPED FROM REPUDIATING THEIR RESPONSIBILITY.

Appellants contend that the trial court erred in refusing to discharge the supersedeas bond executed

in connection with the appeal. It is our position that the rulings of the lower court were correct.

Without regard to the question of whether or not this bond is enforceable as a statutory supersedeas bond under Rule 73(d), Federal Rules of Civil Procedure, it is our contention that the bond is good as a valid common law obligation and enforceable as such.

In this connection, the following sequence of facts should be noted: The original judgment was filed and entered on October 14, 1953 (Old R. 14, No. 14,531); thereafter the appellants moved for stay of execution, and on October 30, 1953, this motion was granted pending disposition of the motions for new trial, conditioned upon appellant's posting bonds in the sum of \$30,000.00; these bonds, for stay of execution and partial supersedeas were posted on October 30, 1953 (R. 27, 48, 62); on February 4, 1954, the Court filed its opinion denying the motions for new trial (Old R. 51), and on February 18, 1954, entered an order denying all motions previously filed by appellants; on February 23 and 27, 1954, appellants filed two separate notices of appeal (Old R. 26, 57); on March 9, 1954, appellees moved for judgment on the \$30,000.00 stay of execution bonds previously posted, as the appellants had failed to post complete supersedeas bonds to cover the judgment. This motion was argued before the trial judge on April 2, 1954, and was granted by him on April 3, 1954, "unless supersedeas bond is applied for and allowed by 2:00 P.M. of Tuesday, April 6, 1954." The additional bond

to complete supersedeas was then posted and filed on April 9, 1954. (Old R. 27.)

Three years have now elapsed and during this time appellant Matanuska Valley Lines, Inc. has become insolvent and is in the hands of a receiver.

Appellate Courts have been presented on many occasions with the question of liability on a supersedeas bond which was legally insufficient to effect a stay of execution and where enforcement of judgment was in fact suspended. See Annotation 120 ALR 1062.

In *Haffner v. Commerce Trust Company* (Okla. 1938) 86 P(2d) 331, the defendants' denial of liability on the bond was based upon the claim that it was a nullity for the reason that it was without consideration, that it was unauthorized, and that there was nothing for it to supersede. The Court said:

“There is no doubt that recovery may be allowed upon a bond as a common law undertaking even though it may be invalid as a statutory supersedeas bond.”

*Maryland Casualty Co. v. Marshall* (Ky. 1928) 10 SW(2d) 485, is so persuasive in this regard that considerable portions of the opinion are quoted. In that case it was clear that the supersedeas bonds in question were actually void as statutory bonds, because the lower court had no jurisdiction to grant the appeals. The court, however, went on to point out:

“It does not follow, however, that, as these bonds do not have the quality of statutory bonds, they are not good as common law obligations and enforceable as such. In the case of Cotton's

Guardian v. Wolf, 14 Bush 238, we said that a bond, although not good as a statutory bond, would be good as a common-law obligation if it were entered into voluntarily, for a valid consideration, and was not repugnant to the letter or policy of the law. Tested by these characteristics, the bonds involved in these cases were good common-law obligations. They were entered voluntarily, as the Collieries Company and the Maryland Casualty Company had the options of paying the judgments against the Collieries Company, of permitting their enforcement through the processes of the Court, of taking the chance that the plaintiffs would not undertake to enforce them until this court had passed upon them, or of attempting to stay them by the execution of the bonds, and it chose the latter alternative.

\* \* \* We now come to the only troublesome question concerning the validity of these bonds as common-law obligations, and that is the question of consideration. \* \* \* The consideration for this undertaking which the Collieries Company and its surety sought and expected by the execution of these bonds was the stay of the execution of the judgments in question. Although not obliged to do so, since the bonds were not good as statutory bonds, yet as a matter of fact the appellees, relying upon the undertaking of the Collieries Company and the appellant, did forbear to enforce their judgments, and so the obligors by reason of their promise did in fact secure the stay of execution which they sought."

Such is exactly the parallel situation in the present case.

The rule is well settled that although a supersedeas bond not valid as a statutory bond must, to be enforceable as a common law bond, have a sufficient consideration, the receipt by the obligors of the contemplated benefits of the bond in the stay or suspension of proceedings on the judgment is sufficient consideration for the bond. This rule is supported by many authorities including the following: *Hewitt v. Landis* (Colo. 1924) 225 P 842; *Tanguary v. Beshor* (Colo. 1908), 94 P 22; *Lloyds Casualty Insurer v. Farrar, et al* (Tex. 1943) 174 SW(2d) 302.

There is a further substantial reason, based on estoppel, for agreeing with the lower court that the motion to exonerate the sureties on the supersedeas bond should be denied. The position of the appellants in this regard is that there was "no judgment" from which to appeal, and that the posting of supersedeas bonds, therefore, was unnecessary and meaningless and the sureties should be discharged.

The relevant portion of that supersedeas bond reads as follows: "The condition of this bond is that if the *judgment* in full herein be satisfied, together with costs, interest and damages for delay, *if for any reason* the appeal heretofore taken in this case be dismissed; or if the *judgment* be affirmed or modified and as affirmed or modified be satisfied in full together with such costs, interest and damages as the United States Court of Appeals for the Ninth Circuit may adjudge and award, then this bond shall be null and void; otherwise to remain in full force and effect." (Emphasis supplied) (Old R. 27, No. 14,529.)



Thus the appellants, themselves, in the supersedeas bond (as well as in other pleadings) have insisted repeatedly that there was a judgment in this case at all times since October 12, 1954. They have recited the fact of that judgment in the supersedeas bond, which they were allowed to post voluntarily at their own request.

“The surety upon a supersedeas bond will not be heard to attack its validity, and is bound to pay the judgment against his principal.” *Robertson v. Wilkinson* (CCA 5th, 1925) 10 F(2d) 311, 312.

In *McCarthy v. Alphons Custodis Chimney Const. Co.* (Ill. 1906) 76 N.E. 850, the Court said:

“The recitals of the bond sued upon are conclusive as to the validity of the judgment mentioned in the bond. \* \* \* So, in the case at bar, the appeal bond recites the existence of the judgment, and appellant is estopped from denying that there was such a judgment, or that it was void. The appellant here, as surety, voluntarily signed the engagement under his hand and seal for the payment of the judgment, and could not, therefore, deny the existence of the judgment, which he admitted by so signing the bond. \* \* \* The bond was executed in order to enable the parties who signed it to take an appeal from the judgment to the Appellate Court. The bond recites that the appeal had been prayed for and obtained, and provides that the bond is void in case the appeal is prosecuted with effect. Hence the appellant . . . cannot be heard to say that no appeal was ever taken; nor can he be permitted

to question the truth of the recitals in the bond. The bond in question is a voluntary contract. The expenses incurred by appellee in defending the appeal on the faith of the bond are a sufficient consideration for entering into it." (825-853).

Compare, *Perry v. Tacoma Mill Co.* (CCA 9th, 1907) 152 Fed. 115.

To the same effect is *Pierce v. Banta* (Ind. 1892) 31 NE 812; *Adams v. Thompson* (Neb. 1886) 21 NW 316; *Thalheimer v. Crow* (Col. 1889) 22 Pac 779; *Robertson v. Wilkinson* (CCA 5th, 1926) 10 F(2d) 311. In *Gudtner v. Kilpatrick* (Neb. 1883) 15 NW 708, there actually was no valid appeal whatever, because under the statute there was no right of appeal from the particular judgment. Nevertheless, the Court held that the surety bondsmen were estopped to deny liability.

"To allow the defendant to set up and prove these facts to contradict his own recognizance would be to allow him to obtain a delay in the issuing of the execution upon the judgment rendered by the justice, and then, when the delay has been obtained, insist that the recognizance which procured it created no legal obligation." 15 NW 708 at 711.

So, in the present case, by the execution of the supersedeas bond, the defendant has obtained a delay of more than three years. When an actual execution was in the hands of the Marshal, whether valid or not, the appellants prayed and were granted the right of supersedeas. They raised no question as to the

propriety of the action taken by the trial court at that time. On the other hand, the sureties on the supersedeas bond voluntarily entered into this obligation in order to prevent the actual levy of execution which was then impending. Having voluntarily entered into such a contract, it would be most improper to now permit them to deny it. See, *W. J. Donnelly Co. v. Fidelity and Casualty Co.* (Ohio 1926) 155 NE 558, where the Court pointed out that the sureties should be estopped to deny their liability on a supersedeas bond where the bond had subserved one or more of the purposes for which it was given and the appellant had had the benefit thereof.

The Court noted that this should be especially true where the surety by signing the bond prevented the plaintiff from collecting on his judgment and enabled the defendant to put his property out of the reach of the plaintiffs. In *Buttnick v. Buttnick Jobbing & Investment Co.* (Wash. 1924) 227 Pac 852, the Court said:

“Assuming for present purposes that the Buttnick Jobbing & Investment Company and J. M. Buttnick had no right of appeal, and that, on motions of the respondent their appeal would have been dismissed, yet they chose to appeal and doing so gave the bond which was accepted and relied upon by the respondent as a supersedeas bond under which, in fact, if not in law, the original judgment was superseded, and, after having gained the full purpose for which the bond was given, it would be bad law and bad morals to now permit them to say that because, forsooth, their appeal was unnecessary, or might

have been dismissed, they may not avail themselves of their own mistake, and thus relieve both principals and sureties, and wholly deprive respondent of the security which the statute requires to be given when a judgment is superseded on appeal. The bond cannot be said to be without consideration. There was in fact a detriment to the obligee in that she relied upon the bond, and did not seek to enforce the judgment pending the appeal, even though it be thought that there was no benefit to the obligors, and that there was such a benefit is at least debatable. We think appellants cannot now be heard to question the sufficiency of the bond.”

Although the judgment, under the provisions of Rule 54(b) was not in fact final and therefore could not properly be executed upon, nevertheless, all parties were then treating the judgment as though it were final and enforceable and in fact the trial court had authorized the issuance of execution thereon and execution was in the hands of the Marshall. Instead of raising the question of finality with the trial court or in the Appellate Court, at that time, the defendant and the sureties chose to execute this supersedeas bond to suspend the execution which was then in the process of being made. It would indeed be “bad law and bad morals” to now permit these sureties to be exonerated, while the judgment against their principal stands and the appeal is undecided.

The argument of the appellants rests upon a fallacious and unsound major premise, to-wit: that because the trial court failed to comply with Rule

54(b) there was *no* judgment, or that the judgment was "invalid" or "void". (New Br. 7.)

Not so. The judgment of October 12, 1953, existed and continued to exist after the decision of this Court, in spite of the unfortunate language used. It became final and appealable when the District Court signed and entered the order and certificate on May 21, 1956. (R. 13.) The decision of this Court did not, in our opinion, obliterate the previous judgment, as would be the case had the judgment been expressly vacated or a new trial been ordered. This point alone is sufficient to distinguish those authorities cited by the appellants where the Appellate Court set aside the verdict and ordered a new trial, as in *Gelder v. National Surety Co.* (N.Y. S.Ct. 1912) 137 NYS 716, or where the order of the lower court was reversed and the judgment vacated, as in *Regierer v. United States Fidelity and Guaranty Co.* (N.Y. S.Ct. 1912) 136 NYS 42. .

Note the language of the New York Supreme Court in the *Gelder* case quoted by the appellants at pages 9-10 of its new brief:

"By the order of this Court setting aside the verdict herein and ordering a new trial, the foundation of the judgment was taken away.  
\* \* \* The intent of the parties to the contract of suretyship was that the defendant should not be liable unless the liability of its principal was established." (718)

But, in the present case the verdicts were never set aside, nor was a new trial ever ordered, either by

the District Court or by this Court. The liability of the principal, Matanuska Valley Lines, was fixed by the judgment of October 12, 1953, and cemented firm by the denial of its motion for new trial on February 18, 1954. When these supersedeas bonds became effective as such on April 9, 1954, therefore, the liability of the principal was then just what it has been ever since, and the position of the sureties is still the same.

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**3. THE TRIAL COURT DID NOT ERR IN CONTINUING THE BONDS IN EFFECT ON THIS APPEAL.**

In the final portion of their argument, appellants contend that the refusal of the trial court to discharge these bonds and exonerate the sureties or to set a new bond has continued the bonds in full force and effect on the new appeal. (New Br. 20-24.) Although the lower court refused to make any such express finding, we concur in the opinion of the appellants as to the net result; the bonds are still insuring supersedeas at the present time.

However, unlike the appellants, we feel that this result is both lawful and proper; our reasons have been enunciated above.

From an examination of the face of the bonds appellants have attempted to classify the sureties into two groups: corporate compensated sureties, and individual non-compensated sureties, and have pointed out that different rules relative to liability govern the two classes. (New Br. 20.) We do not quarrel with

the principles of law stated by the appellants at this point, nor with the cases which they have cited. Again, however, they are arguing from a non-existent major premise. There is nothing in the record of any kind to indicate whether any of these sureties are compensated or uncompensated, nor is there anything to properly give the Court any reason or justification to speculate in that regard. Further, these rules of interpretation, in any event, are only to be used where the provisions of the bond in question are ambiguous and subject to different constructions. There is nothing ambiguous or doubtful about *the language* of the bonds in the present case; the only question raised is whether the bonds are still effective after dismissal of the original appeal.

Finally, appellants contend that these bonds should not be continued because the financial ability of the principal, Matanuska Valley Lines, has deteriorated in the three years since the bonds were signed. (New Br. 23.)

Of course, the chief reason for the execution of a supersedeas bond in any case is to insure the payment of the judgment in the event the principal is unable to pay it. That the principal may not be able to pay is the risk which the surety voluntarily assumes. The fact that Matanuska Valley Lines is insolvent, far from being an argument for release of these bondsmen, is a compelling reason why their liability should be continued. By signing these bonds they have prevented the injured appellees from collecting for their injuries when they might have done so, three years

ago. To permit these sureties to walk away now, before the merits of this appeal have been finally decided, would, we submit, shock justice.

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**4. THE MOTION FOR NEW TRIAL WAS PROPERLY DENIED;  
THE JUDGMENT SHOULD BE AFFIRMED.**

Appellants contend that the trial court erred in denying their motion for new trial and adopt the argument of their previous brief in this regard. (New Br. 24.)

This case was fully tried to a jury and lawful verdicts returned. Motions for new trial were briefed, fully argued, and denied by the trial judge who heard the evidence. Motions for a new trial were again briefed and argued before the successor judge in the lower court, and have again been denied.

There was ample evidence from which the jury could have, and did find that the appellant Matanuska Valley Lines had been negligent toward these appellees. We adopt the argument of our first brief (Br. 6-19) in this regard.

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**V.**

**CONCLUSION.**

There has been no "extension" of the coverage of the supersedeas bonds which appellants voluntarily gave in this case, nor has there been any alteration or increase in the risk which they assumed. The judg-



ment which the bonds supersede is the same now as it was when they executed the bonds. The appellants are estopped to deny the validity of their obligation; in any event, the bonds are enforceable and should be continued as the contract of the parties.

We respectfully reiterate that the verdicts of the jury and the judgment of the lower court should not be disturbed. The judgment should be affirmed.

Dated, Anchorage, Alaska,  
April 5, 1957.

Respectfully submitted,  
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Nos. 15,252, 15,253, 15,254

United States Court of Appeals  
For the Ninth Circuit

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation, LEWIS E. SIMPSON, LOUIS  
ODSATHER, J. A. COLUMBUS, H. N. BAKER,  
RUSSELL SWANK and NORMAN G. LANGE,

*Appellants,*

vs.

DOROTHY NEAL and NATHANIEL NEAL, JR.,

*Appellees.*

No. 15,252

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation,

*Appellants,*

vs.

BLANCHE THOMAS,

*Appellee.*

No. 15,253

MATANUSKA VALLEY LINES, INC., a corporation,  
and GENERAL CASUALTY COMPANY OF AMERICA,  
a corporation,

*Appellants,*

vs.

WORDIE FRAZIER and PRINCE FRAZIER,

*Appellees.*

No. 15,254

On Appeal from the United States District Court  
for the District of Alaska, Third Division.

REPLY BRIEF FOR APPELLANTS.

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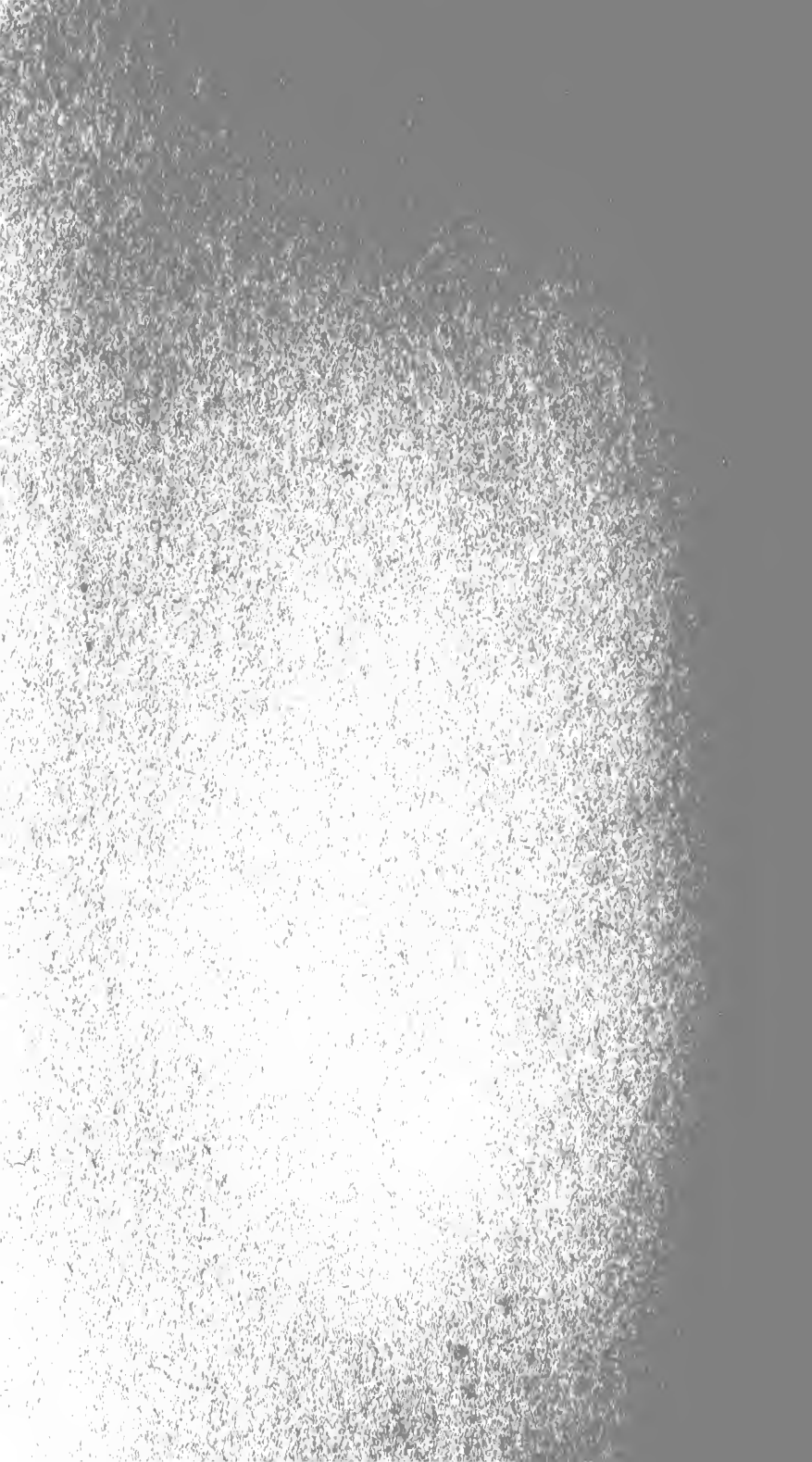
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*Appellees.*

No. 15,254

On Appeal from the United States District Court  
for the District of Alaska, Third Division.

## REPLY BRIEF FOR APPELLANTS.

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### I.

#### SO-CALLED JUDGMENT AS RES JUDICATA.

The appellees contend that the so-called judgment  
signed on October 12, 1953 stands as being *res judicata*

as to the issues raised and tried at the trial. Appellants do not understand the law to be such, but rather contend that inasmuch as the so-called judgment of October 12, 1953 no longer exists but stands supplanted by the judgment signed and entered on the 21st day of May, 1956, that the former so-called judgment cannot be taken as *res judicata* particularly in the light of the fact that an appeal has been taken and perfected from the judgment now of record, dated May 21, 1956. The jury verdicts will stand until the appeal presently before the Court is disposed of, and likewise the judgment of 1956 stands also, but does not have the stature of *res judicata*. This judgment certainly could not be pleaded in bar were another action commenced on the same facts presented at the trial, but certainly could be pleaded in abatement until the questions raised concerning this judgment have been disposed of by the Appellate Court. The judgment of 1953, being the former so-called judgment and not complying with Rule 54(b), certainly cannot be considered a final judgment.

The appellees cite the cases of *Winsor v. Doumit* (C.A. 7th 1950), 179 Fed. (2d) 475, and *Lyman v. Remington Rand Co.* (C.A. 2d 1951), 188 Fed. (2d) 306 at page 6 of their brief, which appear to be parallel cases with this Court's opinion in the present case when formerly appealed, appearing at 229 Fed. (2d) 136, concerning the purpose of Rule 54(b) and the requirement of the judgment to comply therewith before a Federal Appellate Court has jurisdiction to hear the matter. With this general proposition appel-



lants are in accord, but submit it furnishes no solution to the question posed in this appeal.

The appellees cite the case of *Kauffman and Ruder, Inc. v. Cohn and Rosenberger*, (C.A. 2d 1949), 177 Fed. (2d) 849, wherein discussion is had concerning a *nunc pro tunc* order, but, of course, this Court in its opinion referred to above fairly concluded that the trial Court could not make its order *nunc pro tunc* and the records reflect that it did not, due to the conduct of the previous trial judge. The appellees also cite a number of other cases at page 7 in their brief, all of which treat the question of Rule 54(b) and reiterate the fact that a purported judgment failing to comply therewith is not final nor appealable. With this proposition the appellants are in agreement, but these cases do not hold that such a defective judgment is in fact *res judicata*. The issues may well be settled but this does not make the defective judgment *res judicata*.

The appellees at page 8 of their brief cite the case of *Tuolumne Gold Dredging Corporation v. Walter W. Johnson Co.*, (D.C. Cal. 1947), 71 Fed. Supp. 111, where the Court, in being presented with a 54(b) situation, held that because the judgment is interlocutory does not preclude a holding of *res judicata* as to the phase finally concluded.

The appellees in their brief at page 8 recite the following language:

“The fact is that the judgment of October 12, 1953 from which appellants appealed and in connection with which the supersedeas bonds were executed, has never been disturbed: it has only been supple-

mented and made final by the certificate of May 21, 1956.”

Appellants contend that according to this Court's opinion in the first appeal, there never existed a judgment prior to or during the first appeal, and submit that the only judgment in this case was signed and entered on May 21, 1956. Nowhere in the record does there appear an intention on behalf of the appellees or the trial Court that the judgment herein signed and entered May 21, 1956 could relate back to any point in the past. As pointed out, this Court, by its opinion, indicated that a *nunc pro tunc* order in the light of the trial judge's conduct in denying all motions would appear to prohibit the entry of a *nunc pro tunc* order. Accordingly, there is one judgment here and that is the judgment signed and entered May 21, 1956, and it is from this judgment that the appellants have prosecuted this appeal, and it is this judgment which the appellants contend to be erroneous for the reasons set forth in their briefs filed in the former appeal, allowed by this Court to be used in this appeal, and in their briefs now filed supplemental to their original briefs. After the questions therein raised have been heard and disposed of by this Court and judgment is entered on the mandate, then and only then will the judgment of May 21, 1956 be *res judicata*.

## II.

**SUPERSEDEAS BONDS POSTED IN FORMER APPEAL NOT GOOD  
AS COMMON LAW OBLIGATION BY REASON OF ABSENCE  
OF CONSIDERATION.**

At the outset, certain observations must be made with regard to the appellees' position concerning the supersedeas bonds here in question. In their brief at page 9 they appear to abandon the assertion that the supersedeas bonds as posted are good as statutory supersedeas bonds. It has certainly been the appellants' contention that the supersedeas bonds are not valid as statutory bonds for the reasons set forth in their opening brief. Also it is important to note that the appellees admit in their brief at page 16 as follows:

“Although the judgment, under the provisions of Rule 54(b) was not in fact final and therefore could not properly be executed upon, nevertheless, all parties were then treating the judgment as though it were final and enforceable and in fact the trial court had authorized the issuance of execution thereon and execution was in the hands of the Marshal.”

Accordingly, as the facts now stand the appellees admit that the supersedeas bonds are not valid as statutory supersedeas bonds, and likewise admit that the so-called judgment was not final as required by 54(b), and therefore, execution could not lawfully be had for the enforcement of such so-called judgment. By this language the appellees admit that that so-called judgment could not have been lawfully enforced had they sought to do so. With this appellants agree,

and in the light of this fact, find it difficult to understand how it could be claimed there can be any consideration for a common law obligation. Most of the cases in holding a supersedeas bond void as a statutory obligation, but valid as a common law obligation, support this finding with a finding that the consideration for this obligation was the forbearance of execution under the impression that execution was stayed and accordingly, a detriment to the obligee or the appellant having obtained a hearing on the merits and a decision in the Appellate Court, and thus a benefit to the obligor. It is apparent that neither have the appellees suffered a detriment by voluntarily refraining from enforcing their so-called judgment in that the appellees admit that such so-called judgment could not have properly been enforced by execution, nor have the obligors received a benefit by way of the appeal. Certainly the fact that the appellees refrained from doing or attempting to do that which they could not lawfully do is not sufficient consideration to support the common law obligation. This Court in the former appeal dismissed such appeal for failure to present a final judgment, and thus, this Court was without jurisdiction and rendered a decision on the merits.

The appellees cite the case of *Haffner v. Commerce Trust Co.*, 86 P. (2d) 331 in their brief at page 10 for the proposition that though a bond be void and unenforceable as a statutory obligation, it may, if supported by sufficient consideration, be enforceable as a common law obligation. With this general statement of the law appellants have no quarrel. However,

it is appellants' contention that the bonds as posted herein cannot be valid as a common law obligation for the reason that they want consideration sufficient to support the promises contained therein. In the *Haffner* case a judgment was recovered by the plaintiff in the trial Court, and the defendant noticed appeal after the statutory period within which notice was required had elapsed. The Appellate Court dismissed the appeal for the reason that the period in which the appeal could be noticed had expired. Following the notice of appeal the defendant had posted a supersedeas bond, and the action in the *Haffner* case was directed towards recovery on the bond as posted. The judgment creditor brought his action against the principals and sureties on the bond and recovered judgment in the trial Court. From this judgment the principals and sureties appealed. The appellants therein contended that the bond, by virtue of the fact that it was unauthorized due to the lapse of time for noting appeal, was a nullity. The appellee responded that the action on the supersedeas bond was good, in that even though it was not valid as a statutory supersedeas bond, it was valid as a common law obligation. The appellee contended that the bond was without consideration and the Court recited in response to this contention that of course, consideration is an essential element to every valid contract. Concerning the consideration supporting the common law obligation in the *Haffner* case, the Court stated:

"All of the benefits to be derived by the obligors to the detriment of the obligees by the giving of the bond has been enjoyed."

The Court further recited that:

“Execution on its judgment against them had been delayed during the entire period that their appeal was pending. The benefits of execution thus foregone by the plaintiff is sufficient consideration for the contractual obligation assumed by the defendants under the bond in question.”

Further in regard to the question of consideration, the Court stated, quoting from a previous case in that jurisdiction, at page 34 of its opinion:

“... The court has not been concerned with whether the stay was obtained as a matter of right rather than as a matter of fact, and we consider it pretty well settled in this jurisdiction that if the end sought by the filing of the undertaking is obtained, if execution is stayed, there is liability on the undertaking...”

With this statement of the law appellants have no quarrel, but point out that in the case presently before this Court, the appellants have enjoyed no stay of execution, either in law or in fact, as a result of posting the supersedeas bonds inasmuch as appellees have admitted that execution could not properly have issued for the enforcement of the former so-called judgment as it was not in fact a final judgment.

The appellees next cite the case of *Maryland Casualty Company v. Marshall*, 10 S.W. (2d) 485 at page 10 of the appellees' brief, and set forth a substantial portion of the Court's opinion therein. In that case as in the case before this Court, the bonds appeared to be invalid as a statutory obligation. The Court in

that case went on to consider the bonds from the viewpoint of common law obligations. With regard to these bonds the Court stated, as appears from the language quoted on page 11 of the appellees' brief:

"... They were entered voluntarily, as the Collieries Company and the Maryland Casualty Company had the options of paying the judgments against the Collieries Company, of permitting their enforcement through the processes of the Court, of taking the chance that the plaintiffs would not undertake to enforce them until this court had passed upon them, or of attempting to stay them by the execution of the bonds, and it chose the latter alternative . . ."

Accordingly, from the language quoted by the appellees, it appears without question that the judgment creditor therein could have properly enforced his final judgment by a writ of execution. Apparently, though the bonds were not good as statutory obligations, the appellee therein refrained from taking execution to enforce his judgment, and accordingly, the Court concluded that this forbearance was sufficient consideration to support the common law obligation. Therefore, and again referring to the language quoted by the appellees at page 11 of their brief where the Court stated:

"... The consideration for this undertaking which the Collieries Company and its sureties sought and expected by the execution of these bonds was the stay of the execution of the judgments in question. *Although not obliged to do so, since the bonds were not good as statutory bonds, yet as a*

*matter of fact the appellees, relying upon the undertaking of the Collieries Company and the appellant, did forbear to enforce their judgments, and so the obligors by reason of their promise did in fact secure the stay of execution which they sought.”* (Emphasis supplied.)

Again, with regard to the *Maryland Casualty Company* case, the appellants have no quarrel with the statement of law set forth therein where one standing as a judgment creditor and entitled to the enforcement of his judgment by execution, refrained from doing so. This, of course, is not the case presently before this Court in that as admitted by the appellees, they did not stand in a position where they could enforce the so-called judgment by execution, but quite the contrary, could not properly have levied execution for the enforcement of the so-called judgment. It is true the so-called judgment was not enforced, but appellants submit this was for the reason that it could not properly be enforced, and not for the reason that the appellants had posted supersedeas bonds. While appellees may contend that they believe that the judgment was good and was effectively stayed, and accordingly did not enforce their judgment, the fact remains that regardless of what the appellees believe, they could not in any event have lawfully enforced the former so-called judgment. Therefore, this fact distinguishes the present case before the Court from those cases in which one holds an enforceable judgment and wrongly believes that he is not entitled to enforce the same by virtue of the existence of a stay bond. In the latter



case, of course, the stay is in fact accomplished, whereas in the case before this Court no stay was allowed in that execution could not properly have issued.

The appellees at page 12 of their brief cite without setting forth applicable portions of the opinion, the cases of *Hewitt v. Landis*, 225 P. 842, and *Lloyds Casualty Insurer v. Ferrar, et al.*, 174 S.W. (2d) 302. In both of these cases there existed a valid judgment, enforceable by execution. Accordingly, these cases are subject to the same distinction as above pointed out concerning the *Maryland Casualty Company* case.

The appellees further cite at page 10 of their brief, an annotation in 120 A.L.R. at page 1062. This annotation deals partially with the question of a common law obligation on a supersedeas bond, but the language used by the annotator following which cases are cited, distinguishes it from the facts of the case here in question. The annotator recites at page 1062:

“The sureties generally are held liable on a supersedeas or appeal bond although it was legally insufficient to effect a stay of proceedings *where as a matter of fact there was a stay*, no execution being issued, nor any attempt made to collect an execution if issued, or to enforce the judgment.” (Emphasis supplied).

Such language presumes the existence of a final judgment enforceable by execution. The annotator goes on to recite at page 1065:

“The rule is well settled that although a supersedeas bond not valid as a statutory bond must,

to be enforceable as a common law bond, have a sufficient consideration, *the receipt by the obligors of the contemplated benefits of the bond in the stay or suspension of proceedings on the judgment is a sufficient consideration for the bond.*" (Emphasis supplied).

Therefore, this language seems inappropriate when applied to the facts of the case presented to this Court on appeal in that the obligors have received no benefit by the appeal nor was there in fact a stay, for there was no judgment to be enforced by execution.

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### III.

**NO ESTOPPEL ARISES AGAINST THE APPELLANTS BY VIRTUE OF HAVING RECEIVED THE SO-CALLED JUDGMENT IN THE SUPERSEDEAS BONDS, NOR BY REASON OF A DETRIMENT TO THE OBLIGEE OR A BENEFIT TO THE OBLIGOR.**

The former so-called judgment, the recital of which the appellees contend now estops the appellants from asserting a failure thereof and the lack of benefit to the obligor and detriment to the obligee as grounds for exoneration of the bond and discharge of the sureties, was prepared and furnished to the court by the appellees as was their responsibility as the prevailing party under the Uniform Rules of the District Court for the District of Alaska which became effective on April 30, 1953, and in particular, Rule 27 which is set forth in full:

"Judgments: Unless the court or judge thereof otherwise orders, every judgment must be prepared by counsel for the successful party and a

copy thereof served on the opposing counsel and bearing his endorsement of service before the same is delivered to the judge for his signature.”

This rule may be found in 14 *Alaska Reports* at page XLIX. This is not an uncommon requirement of local rules to require the prevailing party to prepare the judgment to which he has been found to be entitled. See *Commission Row Club v. Lambert*, 161 S.W. (2d) 732, where the court stated:

“If this decree is in form and substance erroneous, the plaintiff is not entirely without fault because under the rules of procedure in our courts, the duty rests upon the successful litigant to see that the judgment is sufficient in form and substance.”

Accordingly, the duty was upon the appellees here to present to the court a judgment, “sufficient in form and substance.” It is apparent that in this, they failed. Further, the appellants subsequent to the signing and entry of such judgment, moved to have the error of the appellees corrected by their motion for revision in which they asked the court to revise the judgment to comply with Rule 54(b) of the Federal Rules of Civil Procedure. (R-14,529, P. 19; R-14,530, P. 15; R-14,531, P. 17). Thus, it was that some ten days following the signing of the erroneous judgment prepared by the appellees that their error was called to their attention. The record is completely bare of any conduct indulged in by the appellees in an effort to perform the duty which was incumbent upon them as the prevailing party to correct the judgment presented by them. Nor did they join in the motion of the

appellant, Matanuska Valley Lines, Inc., and accordingly, the motion was subsequently denied by the trial judge and the appeal was taken.

Concerning now the question asserted by the appellees of estoppel, the appellees at page 13 of their brief cite the case of *Robertson v. Wilkinson*, 10 Fed. (2d) 311 at page 312, where the Court states a general rule without reciting the basis therefor. There appears no discussion of the factual situation upon which this statement is based, and accordingly, appellants submit that it can be of little assistance in the solution of the problem presented to this Court concerning the question of estoppel. In fact, nowhere in the Court's opinion does it mention the word estoppel, nor are the principles discussed.

The cases cited by the appellees in asserting an estoppel commence at page 13 through 16 of their brief. These cases concerning estoppel fall generally into two classes.

The first class presents a fact pattern wherein a valid and final judgment was recovered by the judgment creditor, an appeal was perfected, a supersedeas bond posted, a stay in fact accomplished, the trial Court is affirmed on appeal and then liability is sought to be enforced on the bonds. At this step in the fact pattern the obligor attempts to raise a question concerning the proceedings had by the trial court when no question had been raised prior to the appeal or the obligor claims the appellant failed to perfect his appeal properly. In this first class of cases, the courts hold that the obligor has received the benefit of the

appeal by virtue of the stay and the contemplated review and decision on the merits, and though the stay accomplished may not have been as a result of the supersedeas bonds, there has been accomplished a stay in fact by reason of the reliance on the part of the obligee in failing to seek enforcement of his judgment by way of execution. In this class of cases fall the cases cited by the appellees as follows: *McCarthy v. Alphons Custodis Chimney Const. Co.* (Ill. 1906) 76 N.E. 850; *Perry v. Tacoma Mill Co.* (CCA 9th, 1907) 152 Fed. 115; *Pierce v. Banta* (Ind. 1892) 31 N.E. 812; *Buttnick v. Buttnick Jobbing & Investment Co.*, (Wash. 1924) 227 P. 852.

The second class of cases present the factual picture where a final judgment has been entered and an appeal is taken, in the process of which a supersedeas bond is posted. Subsequently the appeal is dismissed because an appeal is not allowed due to jurisdictional amount or failure to give the requisite notice within the time allotted, and subsequent thereto the liability on the bonds is asserted. The courts in those cases raise an estoppel against the obligor, basing such estoppel on the benefit received by virtue of the stay in fact accomplished, though perhaps the bond as posted was not valid as a statutory bond, and the obligee refrained from enforcing his final judgment by execution believing that he was prevented from doing so by virtue of the existence of the stay bond. The courts conclude that though he could have enforced his judgment, he in fact, did not and accordingly, the benefit of a stay had accrued to the obligor.

The appellees cite the case of *Robertson v. Wilkinson* (CCA 5th 1925), 10 Fed. (2d) 311 at 312 at page 13 of their brief, and the case of *Tanguary v. Beshor* (Colo. 1908) 94 P. 22, wherein a rigid rule is recited and in the former case, with no reasons for the rule. In the *Robertson* case, the Court simply recites the rule without any particular reasoning set forth to determine the basis of the Court's ruling. The latter case, the *Tanguary* case, seems to lay down an absolute rule of liability which appellants submit is contrary to the weight of authority in the light of the cases cited by the appellees.

The Court in the case of *W. J. Donnelly Co. v. Fidelity & Casualty Company* (Ohio 1926) 155 N.E. 558, in its opinion, cited by the appellees at page 15 of their brief, recites the fundamental purpose of an appeal as follows:

“The purpose and object of an appeal in judicial proceedings is generally twofold: (1) to enable the losing party to obtain a new trial in a higher court, and thereby possibly escape what he conceives to be an unjust judgment; and (2) to stay issuance of an execution against him.”

In raising an estoppel, the Courts look to determine the benefit obtained by the obligor in either one or both of the two instances recited by the Court in the *Donnelly* case. They also look for a detriment incurred by the obligee as a result of his forbearance in enforcing his judgment where he believes, though mistakenly, he is prevented from enforcing his judgment by virtue of a statutory supersedeas bond.

These cases cited by the appellees and their factual patterns are distinguishable from the factual pattern presented by this case on appeal in that the appellees did not possess a final judgment at the time of the execution of the bonds which could be enforced by way of execution. Thus, the appellees did not forbear execution by way of the supersedeas bonds, but could not have lawfully had execution for the enforcement of the so-called judgment by reason of its defects as admitted by them in their brief at page 16. Accordingly, no benefit by way of freedom of execution has accrued to the appellants as a result of any forbearance as certainly the forbearance implies the refraining from doing that which one may lawfully do. Likewise, the appellants have not received the benefit of the appeal by the review of the proceedings in the lower Court due principally to the failure on the part of the appellees to perform that duty which was theirs, to-wit: to present a judgment sufficient in form and substance to the trial Court, and then failing to join with the appellant, Matanuska Valley Lines, Inc., when the appellant moved in the trial Court to correct the defective judgment.

Referring once again to the case of *Hampshire Arms Hotel Company v. St. Paul Mercury & Indemnity Company*, 9 N.W. (2d) 413, cited by the appellants in their initial brief, therein additional language appears at page 15 as follows:

“The dismissal of the appeal was in effect an adjudication that the appeal and consequently the bond was void. The adjudication operates to es-

top plaintiff from asserting that the bond was valid or that the attempted appeal was consideration for it.”

Accordingly, in the instant case appellants assert that by reason of the fact that the appellees failed in performing the duty which was theirs as prevailing litigants to provide the Court with a judgment sufficient in form and substance, and in addition, failed to join in the motion of the appellant, Matanuska Valley Lines, Inc., to correct such judgment, that for this reason they are now estopped to raise an estoppel against the appellants to estop them from asserting that the foundation for the entire proceeding was void and that the bonds were of no force and effect.

This Court has had occasion to consider a problem of a similar nature presented to it in this case, in the case of *National Surety Company v. United States*, (CCA 9th) 29 Fed. (2d) 92.

In that case liability on a bail bond was in question which arose out of an application for a writ of habeas corpus which subsequent to hearing was discharged. The defendant petitioned for appeal and filed an appeal bond in the amount of \$10,000.00. The matter was then considered on appeal and the trial Court was affirmed in *Unverzagt v. United States* (CCA 9th) 5 Fed. (2d) 494. Subsequently in the *National Surety Company* case the government sought to forfeit the bond for failure of the defendant to appear pursuant to the terms of the bond. Trial was had and the trial Court took judicial notice of matters appearing in its records concerning the defendant having been called



upon to appear. The trial Court awarded judgment in favor of the government and the surety company appealed. The judgment was reversed in the *National Surety* case for the failure of the government to prove by introducing a portion of the record showing an entry to the effect that the defendant had, in fact, been called upon to appear. However, in the *National Surety* case, the Court discussed the question of the validity of a bond where no appeal was allowable because there was no final judgment or order. At page 97 of its opinion, the Court, speaking through Judge Hunt, stated as follows:

“It is not to be disputed that ordinarily, if appeal is not permissible, action cannot be maintained on an appeal bond. Should an appeal on a bail bond be dismissed by the Circuit Court of Appeals before it takes jurisdiction, action cannot properly be had on the appeal bond because of lack of consideration for the bond; but where an appeal is taken even though improperly taken and improperly allowed and the court takes jurisdiction, the bond on appeal is valid, and action upon the same will lie for the reason that there is a consideration for the bond, and the principal has been released in consideration of the execution of the bail bond. In the *Unverzagt* case the Circuit Court of Appeals took jurisdiction of the appeal; therefore, action will lie on the appeal bond because of the failure of *Unverzagt* to obey the order of the district court. In other words, an estoppel arises against those who obtain the contemplated advantages pending the disposition of the appeal, and they are estopped from denying their liability when the bond has served the purpose for which it was given.”

In the *Unverzagt* case cited above, the appellate Court heard the appeal and affirmed the trial Court. Accordingly, the language of Judge Hunt where he refers to the Court of Appeals taking jurisdiction must mean that the Court hears the matter on the merits and renders a decision. Thus, it follows that in the event the appellate Court does not take jurisdiction, recovery cannot be had on the bond and no estoppel arises inasmuch as no consideration has passed. This, appellants submit, is precisely what has occurred in the instant case where the appeal was presented to this Court and dismissed on jurisdictional grounds for the failure of the trial Court to enter a final judgment in conformance with the rules. This failure on behalf of the trial Court was joined in by the appellees in their failure to perform the duties which were incumbent upon them. Judge Hunt refers to the question of estoppel and bases such estoppel upon the receipt of contemplated advantages. It is difficult to see where the appellants have received any benefit or advantage by way of the first and abortive appeal, inasmuch as they neither received the benefit of a hearing and decision on the merits, nor did they enjoy freedom from execution for the reason that the so-called judgment could not properly have been executed upon.

Thus, appellants contend that no estoppel should be raised preventing them from questioning the validity of their liability on the bonds for the reasons set forth above. Further, that in the event an estoppel should be raised, this estoppel should be put at large by an estoppel raised by virtue of the fact that the appel-

lees failed in their obligation to present the Court with a judgment sufficient in form and substance, and accordingly, the appellees are the primarily responsible parties for the predicament they now complain of.

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#### IV.

##### **THE TRIAL COURT ERRED IN CONTINUING THE BONDS.**

The bonds in question here reflect that they were executed by corporate sureties and a number of individuals. Appellees contend that the insolvency of Matanuska Valley Lines, Inc. is not to be considered in dealing with the question of extension of these bonds, but is the chief reason why they should be continued. The appellees refer to the usual situation where a principal becomes insolvent, but this is not the usual case in that the bonds were executed at a time when the principal was solvent and doing business, and the denial by the trial Court of appellants' motions which, in effect, continued the bonds, occurred after the principal had become insolvent and was in the hands of a receiver. Accordingly, while the sureties here could well look to the ability of Matanuska Valley Lines, Inc. to pay the judgment at the time of executing the bonds in question, after their insolvency and the creation of the receivership when the bonds were extended, there was no question but what the principal could not pay and the sureties' liability was absolute in the event of an affirmance.

## V.

## CONCLUSION.

The appellants submit that the appellees' argument in its brief is to be distinguished from the case at bar for the reason that the cases which they refer to all contain a valid and enforceable judgment. As has been demonstrated, this is not the factual situation in the case at bar when the bonds in question were executed. Accordingly, the continuation of the bonds by the trial Court was error and it should be reversed.

Dated, May 1, 1957.

Respectfully submitted,

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